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Nos. 79-983 and 79-1689

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, *Appellant*

v.

HUBERT L. WILL, ET AL., *Appellees*

UNITED STATES OF AMERICA, *Appellant*

v.

HUBERT L. WILL, ET AL., *Appellees*

ON APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLEES

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ON APPEALS FROM THE
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BRIEF FOR THE APPELLEES

QUESTIONS PRESENTED

1. Whether provisions contained in the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 788 and Joint Resolution No. 412 (October 12, 1979), Pub. L. No. 96-86, 93 Stat. 656, which imposed temporary limitations on the use of appropriated funds for the payment of statutorily mandated cost-of-living salary adjustments, but which did not by their terms purport to repeal, modify or supersede any statute defining judicial salaries, including the Executive Salary Cost-of-Living Adjustment Act, Pub. L. No. 94-82, 89 Stat. 419, 28 U.S.C. § 461 ["Adjustment Act"], had the effect of temporarily superseding or amending any such statutes for fiscal years 1977, 1979 and 1980.

2. Whether the Act of July 12, 1977, Pub. L. No. 95-66, 91 Stat. 270, which provided that the salary adjustment next scheduled after enactment of that Act "shall not take effect" but which did not by its terms repeal, modify or suspend the Adjustment Act, caused the Adjustment Act to be temporarily repealed by implication for fiscal year 1978.

3. Whether the temporary limitation contained in the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, signed into law by the President on October 1, 1976, may constitutionally be applied retroactively to reduce judges' pay by withholding funds for cost-of-living salary adjustments that had become payable earlier that day.

4. Whether the temporary limitation on the use of appropriated funds contained in Joint Resolution 412, Pub. L. No. 96-86, 93 Stat. 656, adopted October 12, 1979, after the

cost-of-living salary adjustments had become payable on October 1, 1979, applies to the Judicial Branch.

5. Whether the temporary limitation on the use of funds contained in Joint Resolution 412, Pub. L. No. 96-86, 93 Stat. 656, adopted October 12, 1979, may constitutionally be applied retroactively to reduce judges' pay by withholding funds for cost-of-living adjustments that had become payable on October 1, 1979.

6. Assuming that any of the challenged enactments prevented an annual cost-of-living salary adjustment from taking effect, whether the right to cost-of-living salary adjustments prescribed in the Adjustment Act constitutes a portion of judges' "Compensation" within the meaning of the Compensation Clause, Article III, section 1.

7. Assuming that judges' compensation has been diminished, whether appellees must demonstrate that the diminution was part of a discriminatory attack upon Article III judges designed to undermine their independence in order for such a diminution to violate the Compensation Clause of Article III, section 1.

8. Whether appellant's position in these appeals, if sustained, would not totally undermine Article III, section 1 and nullify that constitutional provision as a means of ensuring judicial independence.*

STATEMENT

These cases are brought by fourteen judges of the United States Courts on their own behalf and on behalf of all federal judges serving under Article III of the Constitution.[1]

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* Throughout this brief, the following abbreviations will be used: JS—jurisdictional statement; JA App.—appendix to jurisdictional statement; JA—joint appendix; ASG—acting solicitor general.

[1] Rule 34(b) of the Rules of this Court requires that all parties to the proceedings below be identified. The parties below and in this Court are: Hubert L. Will, John R. Bartels, Henry Bramwell, Lloyd

With certain exceptions, the Statement of the case set out in the brief of the Acting Solicitor General ("ASG") on behalf of appellant contains an adequate description of the judicial pay system (ASG Bf. at 4-8). In the recitation of facts giving rise to the controversy regarding the actions of Congress in withholding the cost-of-living salary adjustments for the fiscal years 1977, 1978, 1979 and 1980, however, appellant's Statement is at times inaccurate and argumentative. Accordingly, appellees submit this supplemental Statement.

One example of the inaccurate or misleading nature of appellant's Statement is the repeated mischaracterization of the legislative enactments at issue in this appeal as "Pay Acts," implying that they are substantive enactments providing for judicial pay. None of the four enactments at issue set rates of judicial pay or appropriated funds for payment of judicial salaries, and three of the four are actually appropriations bills providing funds for other branches of the government.[2]

H. Burke, William J. Campbell, Fred J. Cassibry, Mark A. Costantino, Jack M. Gordon, George B. Harris, Irving Hill, Edward R. Neaher, Thomas Collier Platt, Jr., George C. Pratt and Spencer Williams.

In addition, counsel in these appeals have been retained by the Conference of Metropolitan District Chief Judges.

[2] The first statute, which appellant refers to as the "1976 Pay Act", was actually the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439. It had nothing to do with prescribing the "pay" of federal judges. The cost-of-living salary adjustment for fiscal 1977 was set by the President and was not disapproved by Congress. Judicial salaries were funded by a separate appropriations act for the Judiciary, Pub. L. No. 94-362, 90 Stat. 952.

The Act referred to by appellant as the "1977 Pay Act" (Pub. L. No. 95-66, 91 Stat. 270) provided only that the fiscal 1978 salary adjustment would not take effect. (*Cont.*)

The salary component of judicial compensation (for a district judge) is defined, in part, at 28 U.S.C. § 135 as follows:

> Each judge . . . shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351-361), as adjusted by section 461 of this title [*i.e.*, the Executive Salary Cost-of-Living Adjustment Act].

Similar provisions apply to the compensation of other Article III judges. See 28 U.S.C. §§ 5, 44(d), 213 and 252.[3]

The Act referred to by appellant as the "1978 Pay Act" was the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 788. As in fiscal 1977, the salary adjustment for that year was set by the President and was never disapproved by Congress. Judicial salaries were funded by a separate appropriations act for the Judiciary, Pub. L. No. 95-431, 92 Stat. 1021.

The Act referred to by appellant as the "1979 Pay Act" was Joint Resolution No. 412, Pub. L. No. 96-86, 93 Stat. 656, adopted to provide temporary funding for certain agencies whose prior appropriations had lapsed. Again, the salary adjustment for fiscal 1980 had been set by the President and was never disapproved by Congress. Judicial salaries were funded by a separate appropriations act for the Judiciary, Pub. L. No. 96-68, 93 Stat. 416.

[3] It should be noted that, prior to enactment of the Adjustment Act in 1975, 28 U.S.C. § 135 provided that "[e]ach judge of a district court of the United States shall receive a salary of [x]", where "x" was the actual dollar rate set under the Federal Salary Act of 1967. In 1975, 28 U.S.C. § 135 and similar provisions applying to the compensation of other Article III judges were amended to define the salary component of a judge's compensation as the combined base amount determined under the Salary Act *and* the adjustment provided under the Adjustment Act.

At page 6 of his brief, the ASG states that the "Federal Salary Act contains no provision for annual adjustments to the salaries of Federal judges . . .", suggesting that the right to an adjustment is not a component of judges' compensation. The contrary is clear; this was conceded below, where 28 U.S.C. § 135, including its reference to the annual adjustment, is cited as the "compensation which judges shall receive for their services". 79-983, Statement of Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings, at 3.

The Executive Salary Cost-of-Living Adjustment Act, adopted in 1975, 28 U.S.C. § 461 (79-983 J.S. App. 26a-27a) [hereinafter the "Adjustment Act"] provides that the salaries of certain federal employees, including judges, shall be adjusted annually in an amount measured by the average adjustment in General Schedule salaries as determined under the Federal Pay Comparability Act of 1970, 5 U.S.C. § 5305, *et seq.*[4] [hereinafter the "Comparability Act"]. These percentage adjustments are submitted to Congress by the President and, for judges, become payable without further action by Congress on October 1 of each year (the first day of the fiscal year), unless within 30 days of their submission either House of Congress adopts a resolution disapproving the President's report.

The first salary adjustment, in the amount of 5% for fiscal 1976 (commencing October 1, 1975) was paid. This marked the first adjustment in judicial salary levels in more than six years and established the salary of a district judge at $42,000. In each of the next four years, Congress has by various temporary enactments withheld funds necessary to pay the adjustments, although it has never adopted a resolution disapproving the President's report.

For fiscal year 1977 (commencing October 1, 1976), the annual rates of pay for General Schedule employees were increased by an average of 4.8%. The same adjustment applied by virtue of the Adjustment Act to Executive Schedule salaries, including those of federal judges. The annual salary of district judges was thereby established at $44,000, payable October 1, 1976.[5]

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[4] The General Schedule sets the salary rates of approximately 1,600,000 federal employees. There are approximately 5,400 Executive Schedule employees, including federal judges. Public Information Bulletin, United States Office of Personnel Management, August, 1980.

[5] Executive Order No. 11941, 3 C.F.R. 151 (1976 Comp.).

Later that same day, after the salary adjustments had become payable, the Legislative Branch Appropriation Act of 1977, Pub. L. No. 94-440, 90 Stat. 1439, 1446 (79-983 J.S. App. 31a) [hereinafter the "1977 Appropriations Act"], was signed by the President. Among other things, the 1977 Appropriations Act imposed a temporary limitation on the use of funds available to pay the full salary of federal judges. Specifically, the Act provided that appropriated funds could not be used to pay salaries for certain positions, including judges, at a rate which exceeded the rate in effect on September 30, 1976, the last day of the previous fiscal year. For district court judges, this proviso is interpreted by appellant to have limited temporarily the salaries of district judges to $42,000, the amount applicable in the prior fiscal year. The effect and legality of this fiscal 1977 limitation in the 1977 Appropriations Act is the subject of Count I of Appeal No. 79-983, [hereinafter, "Will I"].

Effective July 12, 1977, Congress passed Pub. L. No. 95-66, 91 Stat. 270, providing in pertinent part that any adjustment in Executive Schedule salary levels, including judicial salaries, which ordinarily would go into effect on October 1, 1977, "shall not take effect." Because of this limitation, the adjustment of 7.2% which became payable for General Schedule employees in October, 1977, was withheld from judicial salaries. The legality of this fiscal 1978 limitation is the subject of Count II of Will I.[6]

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[6] Apart from the mischaracterization of the July 12, 1977 enactment as a "Pay Act", the brief of the ASG contains an additional inaccuracy in its explanation of the enactment. The brief states that the sole purpose of the 1977 enactment was to eliminate the expected October, 1977 [fiscal 1978] salary adjustment because the goals of comparability had been achieved through implementation of the Quadrennial Commission's recommendations. The ASG fails to note that the 1977 quadrennial increase to $54,500

On September 30, 1978, Congress passed the Legislative Branch Appropriation Act of 1979, Pub. L. No. 95-391, 92 Stat. 788 (79-1689 J.S. App. 21a-23a) [hereinafter the "1979 Appropriations Act"]. That appropriations measure contained a temporary proviso which restricted the use of funds to pay the fiscal 1979 adjustment (5.5%) and which was virtually identical to that contained in the 1977 Appropriations Act. (See Pub. L. No. 95-391, § 304(a)(1) at 79-1689 J.S. App. 21a-23a).

Although the legality of this appropriations limitation, as it pertained to salary payments to judges during fiscal 1979, is disputed, the Acting Solicitor General concedes that, in any event, the limitation was "temporary" and judges became entitled to this adjustment on October 1, 1979, at the latest. (ASG Bf. at 12; 40-41, n. 33). The validity of this fiscal 1979 limitation is challenged in Count I in Appeal No. 79-1689 [hereinafter, "Will II"].

On August 30, 1979, the President submitted to Congress an adjustment of approximately 7% to become effec-

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for district judges, which the ASG implies attained comparability, followed a Commission recommendation that an annual salary of $62,000 for district judges was necessary to achieve comparability. That Congress also did not believe comparability had been achieved is evident from comments of its leaders only one month later. See comments of Senators Baker and Byrd, 123 Cong. Rec. 7095 (1977). The adjustment in March of 1977 merely served to make up some of the ground which had been lost through Congress' failure during the previous eight years (with the single exception of a five percent adjustment in 1975) to adjust judicial salaries.

More important, the quadrennial adjustment of March 1, 1977, did not take account of the cost-of-living increases experienced in fiscal 1978 (October 1, 1977 through September 30, 1978) and these increases have never been offset as intended by the Adjustment Act. For these reasons, the ASG's implicit argument that payment of the fiscal 1978 adjustment would have been a "double" payment is without factual foundation.

tive October 1, 1979. Appellant also concedes that this salary adjustment went into effect on October 1, 1979. (ASG Bf. at 12; 79-1689, J.S. 6-7, 14, 19, n. 11.) Accordingly, on October 1, 1979, two events occurred. First, the "temporary" limitation imposed under the 1979 Appropriations Act, if ever valid as to judges, expired and the 5.5% increase became immediately payable. Second, the fiscal 1980 adjustment of approximately 7% became payable. The aggregate of the 1979 and 1980 salary adjustments resulted in a total salary adjustment of 12.9% over the rates actually being paid judges prior to October 1, 1979. (ASG Bf. at 12; 79-1689 J.S. 6, 7, 14, 19, n. 11).

On October 12, 1979, Congress adopted Pub. L. No. 96-86, 93 Stat. 656 (79-1689, J.S. App. 23a-26a), a Joint Resolution intended to provide appropriations for certain agencies, which included a proviso that, for the fiscal year 1980, "funds available for payment to executive employees which includes Members of Congress . . . who under existing law are entitled to approximately 12.9 percent increase in pay, shall not be used to pay any such employee or . . . official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year". (79-1689, J.S. App. 24a-25a). The Congress thus conceded that the affected employees "under existing law *are entitled* to approximately 12.9 percent increase in pay." (emphasis added). The validity of this fiscal 1980 limitation is the subject of Count II of Will II.

The Acting Solicitor General concedes that application of the proviso in Pub. L. No. 96-86 to judges results in a direct diminution of their legally established compensation. (ASG Bf. at 51, n. 43 and at 60).

In the court below, appellees contended that the limitations contained in the 1977 and 1979 Appropriations Acts,

the Act of July 12, 1977, and the October 12, 1979 Joint Resolution did not purport to have and did not have the effect of altering or amending the statutory salary of judges and did not amend or repeal the Adjustment Act. Accordingly, the adjustments of 4.8% (fiscal 1977), 7.2% (fiscal 1978), 5.5% (fiscal 1979) and 7% (fiscal 1980) became payable, but have not been paid. Appellees also contended that, if these limitations somehow prevented the compensation adjustments from taking effect, they were in violation of the Compensation Clause of Article III, section 1 and were therefore unconstitutional.

The district court granted summary judgment in favor of appellees on all counts of both complaints and entered judgments for appellees in both cases. The judgments require the payment of back pay to appellees and the classes involved in each count of both cases. The judgments also require adjustments of rates of judicial pay over rates presently being paid all federal judges to take into account the cost-of-living adjustments payable for fiscal years 1978, 1979 and 1980.[7]

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[7] The Judgment in Will II specifically directs that the salaries of plaintiffs and their class be computed without regard to the restriction contained in the appropriations bills. (79-1689, J.S. 11a-12a). The same result is necessary in 79-983, as the district court concluded that the purported limitations were invalid. (79-983 J.S. 1a-21a).

SUMMARY OF ARGUMENT

The Compensation Clause, Article III, section 1 of the Constitution, provides:

> The Judges, both of the supreme and inferior Courts shall hold their Offices during good Behavior and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

I.

These appeals are taken in cases brought by fourteen United States judges as class actions on behalf of all Article III judges. These actions were brought reluctantly, after long and careful consideration of the sensitive questions involved, and only after appellees concluded that there was no alternative if the independence, integrity, quality and equality of the Judiciary is to be preserved. By the nature of the actions, affirmance of the judgments of the district court will affect the salary levels of all Article III judges including the Justices of this Court. This circumstance raises the potential application of the provisions of 28 U.S.C. § 455 which provides for the disqualification of any judge who has a "financial interest in the subject matter in controversy." (ASG Bf. App. 1a-3a).

The parties agree, first, that the restraints imposed by § 455 are not jurisdictional in nature and, therefore, have no effect on the jurisdiction of this Court or the district court.

The parties also agree that, because every judge has an interest in the controversy, the "rule of necessity" permits any judge to sit notwithstanding any personal interest. Appellees have fully researched the issue, including the long and well-settled history of the rule of necessity and the

legislative history of 28 U.S.C. § 455. The rule has been involved in numerous cases in this Court and in State and lower federal courts, including cases dealing with judicial salaries. (See cases cited at pages 19-20 notes 12, 13, 14 and 15, *infra.*) Many of these cases were decided after the adoption of 28 U.S.C. § 455 or in the presence of disqualification statutes similar to § 455. After thorough research, appellees have found no case where a disqualification statute prevented the case from being heard and no authority which requires disqualification of the Justices of this Court from hearing these appeals.

II.

The principal non-constitutional ground for upholding appellees' right to pay adjustments is the fundamental principle of statutory construction and appropriations law that an appropriations act generally does *not* amend, repeal or rescind substantive law.

Appellees' rights here are established by the statutes defining judicial pay which incorporate the Adjustment Act and which have not been amended or repealed since 1975. Adjustments for judges under the applicable statutes go into effect October 1 of each year, following submission of the President's report to the Congress, unless either House adopts a resolution disapproving them. No such resolution has ever been passed.

The simple non-constitutional issue presented in these appeals, therefore, is whether restrictions on the use of appropriated funds adopted in each of the last four years somehow temporarily repealed the Adjustment Act and altered the rates of judges' compensation otherwise payable. Appellees submit that the restrictions merely temporarily withheld funds for the full payment of the salary of judges, without in any way altering the judges' legal entitlement to those full salaries.

In three of the four years here at issue (fiscal 1977, 1979 and 1980) the limitations are in appropriations bills providing funds for agencies other than the Judicial Branch. In the other year (fiscal 1978) the limitation was not contained in an appropriations act. When analyzed, however, the 1978 Act is also a limitation on the use of funds and not an attempt to repeal or supersede the Adjustment Act.

In these appeals, the ASG contends that by adoption of the funding limitations, there was in each year a "temporary" repeal of the Adjustment Act by implication. Appellees disagree. If Congress had intended to repeal or amend that Act, it would have said so, bearing in mind the repeated admonitions of this Court that "the intention of the Legislature to repeal must be clear and manifest", that "repeals by implication are not favored", and that the policy against repeals by implication applies with even greater force when the claim to repeal rests solely on an appropriations act. See discussion at pages 23, 29-35, *infra*.

Appellant's position that temporary repeals or suspensions were accomplished by implication in each year is refuted by: (1) the opinions of two Presidents who issued Executive Orders after the limitations provisions were adopted, showing judicial salaries at the adjusted rates and noting that only the absence of appropriated funds prevented their payment; (2) the opinion of Congress expressed in Pub. L. No. 96-86, which states that judges were "entitled" to a 12.9% adjustment and thus acknowledges that the fiscal 1979 limitation did not prevent the 5.5% salary adjustment from taking effect; (3) the opinion of the Acting Comptroller General who advised Congress, prior to adoption of the fiscal 1977 Appropriations Act, that the limitation would not "suspend or postpone" the adjustments under the Adjustment Act and was "not therefore a limitation on the rates of pay established thereunder"; (4) the opinion of the

Office of Personnel Management, which advised all federal agencies that the fiscal 1979 limitation was merely a restriction on the use of appropriated funds and that the lawful rates of pay were the *adjusted rates;* (5) the opinion of the Administrative Office of the United States Courts which advised judges, after the fiscal 1977 limitation had been adopted, that although funds were not available for payment, salaries had been adjusted; (6) the Rules of both the Senate and the House which generally prohibit the use of appropriations measures to amend prior statutes; (7) well-settled principles of statutory construction; and (8) the applicable legislative history. Appellant's position is also inconsistent with its admission that the appropriations limitations were "temporary" only and expired by their own terms at the end of each fiscal year.

In addition to the foregoing, there is a separate reason why the fiscal 1980 limitation did not retroactively withdraw the cost-of-living adjustments for judges. Joint Resolution 412, Pub. L. No. 96-86, 93 Stat. 656, purports only to limit funds "available for payment to *executive employees, which includes Members of Congress* who under existing law are entitled to approximately 12.9 percent increase in pay . . . ." (emphasis supplied). This Act does not purport to apply to the Judicial Branch, but is limited by its terms to executive employees and Members of Congress.

That judges' salaries could not be, and were not, included in this limitation is also clear from the repeated acknowledgments by members of both Houses that judicial salaries could not constitutionally be reduced or "rolled back."

For all of these reasons, the judgments of the district court in these cases may be affirmed on non-constitutional grounds.

III.

While appellees agree that there is a non-constitutional basis for affirming the judgments below, they urge that this Court determine, as did the district court, that the right to annual salary adjustments provided by statute is an integral part of judges' compensation which cannot constitutionally be withheld. In each of the years in question, Congress withheld a portion of the compensation to which judges were entitled. Whether this was accomplished by temporary funding limitations or by an implied amendment to statutes which established judges' salaries is immaterial from a constitutional standpoint. The refusal to pay was, in each instance, unconstitutional.

Congress has included the adjustment as part of a judge's compensation. 28 U.S.C. § 135 states that "Each Judge . . . shall receive a salary at an annual rate determined under . . . [the Federal Salary Act] as adjusted by . . . [the Executive Salary Cost-of-Living Adjustment Act]." Under this section, the salary of district judges is defined as including *both* a base compensation *and* an annual adjustment. Other statutory provisions define the salaries of other Article III judges in a like manner. See text at p. 4, n. 3, *supra*.

The court below correctly held that, although cost-of-living salary adjustments are not payable until October 1 of each year, the right to cost-of-living salary adjustments is a component of judges' compensation which may not be diminished or revoked. Therefore, the actions of Congress in refusing to appropriate funds for these adjustments, if effective, were in violation of the Compensation Clause. The decision in this regard is supported by numerous authorities including cases as early as 1803 and as recently as two cases decided by the Supreme Courts of Delaware and California in 1977 and 1980. Those courts, in applying analogous provisions in their own State constitutions, held that annual

cost-of-living adjustments provided for by statute were part of judicial compensation and could not be revoked by subsequent legislation. See discussion at pages 51-53 *infra*.

The writings of the founding fathers, the debates of the Constitutional Convention and a long list of authorities interpreting the Compensation Clause all uniformly support this proposition.

The ASG's position that this legislation did not diminish the compensation of Article III judges within the meaning of the Compensation Clause is based on two unsupportable contentions: (1) That a judge's right to an annual salary adjustment under the applicable statute is not a protected component of a judge's salary until it becomes payable on October 1 of each year; and (2) In those instances where the adjustment did become payable before enactment of the funding limitation[8], Congress may reduce compensation so long as the judges affected by the reduction cannot prove that Congress sought to discriminate against judges or attack their independence. Appellees submit that neither contention has merit. The right to an adjustment is a protected component of a judge's compensation. This is the conclusion of every authority which has considered the issue or any remotely similar issue.

As to the second contention, it has never been held by any court that proof of a discriminatory animus is necessary to

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[8] In two of the four years at issue the adjustments became payable before the funding limitation took effect. The 1980 adjusted salary was payable for 11 days before Congress adopted an appropriations limitation which purported to reduce judges' compensation. And, for fiscal 1977, the appropriations bill containing the limitation was not adopted and approved until October 1, 1976, after the adjusted rate had become payable earlier that day. Thus, for at least a number of hours on October 1, 1976, as appellant conceded below (see p. 43 n. 47 *infra*), judges were earning the adjusted salary.

render a direct diminution of a federal judge's compensation unconstitutional. On the contrary, the rule has always been that congressional action which reduces or withholds from a judge any portion of that to which he is entitled as compensation is, without more, unconstitutional.

This principle has been obvious to the Congress as well. During the Great Depression, numerous statutes were enacted which lowered federal employees' salaries. These enactments always included the proviso: "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." See discussion, at pp. 62-63, *infra*.

And the very statute here involved, the Adjustment Act (which requires that federal judges' salaries be adjusted in the same manner as the salaries of General Schedule employees), specifically exempts federal judges' salaries if General Schedule adjustments result in salary *reductions*. Congress would not have exempted judges from downward adjustments had it shared the views expressed here by appellant.

The contention of appellant, that a non-discriminatory diminution of judicial compensation is permissible, finds no support anywhere.

ARGUMENT

I. THE JUSTICES OF THIS COURT ARE NOT DISQUALIFIED IN THIS CASE

In its Order of February 19, 1980 (J.A. 56a) postponing the question of jurisdiction in Will I, the Court directed the parties "to address the effect of 28 U.S.C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court" (J.A. 56a).[9]

Before doing so, certain vital points should be underscored. First, personal financial gain is not appellees' primary objective. These actions were brought most reluctantly by these jurist-litigants, and only after long and careful consideration of the dilemma of the Judiciary and the implications of such a suit. No one hoped more fervently than did appellees that application of the compensation formula mandated by the Federal Salary Act and the Adjustment Act would establish an equitable and independent basis for determining judicial compensation. Unhappily, because of the attempts of Congress to prevent that formula from being applied, that hope proved false. These actions were brought by appellees in furtherance of their obligation to preserve the independence, integrity, quality and equality of the judiciary envisioned by the drafters of the Constitution. As the Court stated in *O'Donoghue* v. *United States*, 289 U.S. 516, 533 (1933), "there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation." Further, this duty rests upon the federal judiciary not for the purpose of protecting the financial well being or "private advantage" of the individual judge, "but as a continuing

[9] 28 U.S.C. § 455 is set out in the Appendix to appellant's brief at App. 1a-3a.

guaranty of an independent judicial administration for the benefit of the whole people." *O'Donoghue* 289 U.S. at 533.

In this regard, references that appellees seek an increase in pay are inaccurate. Appellees seek only the compensation mandated by statute. And, as shown in the brief of the *amicus curiae,* Chicago Bar Association (at 15-16 and n. 6) these adjustments, (which were paid to over 98% of all federal employees), if paid to judges, would have failed even to maintain parity between judges' salary levels and increases in the cost-of-living. Indeed, if the judgments below are affirmed, a district judge serving since 1968 will still be receiving substantially less in "real dollars" than he or she received in 1968.

On the question of disqualification, appellees agree with appellant that "[t]he strictures imposed by the judicial disqualification statute, 28 U.S.C. § 455, are not jurisdictional in nature" and have no effect on the jurisdiction of the district court or of this Court to hear and decide these cases. (ASG Bf. at 24).

The parties are also in agreement that all Article III judges, including the members of this Court, have a financial interest in the outcome of this case, regardless of date of appointment and regardless of whether they are members of the classes involved in these appeals. (ASG Bf. at 25-26). If the judgments of the district court are affirmed, the salary levels of all federal judges will be adjusted in the same manner; as if the funding limitations contained in the appropriations measures in issue had never been adopted.[10]

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[10] For example, if the judgments of the district court are affirmed in these appeals, the salary of every district judge is $65,800. See Memorandum issued to Judges of the United States by the Administrative Office of the United State Courts, September 10, 1979 (Appendix 1a-3a) for all judges' salaries as adjusted.

This circumstance raises the potential application of the provisions of 28 U.S.C. § 455 which provides for the disqualification of any judge who has "a financial interest in the subject matter in controversy" or "is a party to the proceeding." 28 U.S.C. § 455(b)(4) and (5)(i); (ASG Bf. App. 1a.-3a.). However, because every federal judge has an interest in the controversy, the "rule of necessity" permits any judge to sit notwithstanding such personal interest. On this point the parties fully agree (see ASG Bf. at 24-31, and the Motion to Affirm filed in Appeal No. 1689 at 8-13). Appellees know of no authority to the contrary.

The rule of necessity is long established, having been traced back to at least 1430 and the Yearbooks. *Dimes* v. *Grand Junction Canal Co.*, 10 Eng. Rep. 301, 313 (1852). See, *The Independence of the Judiciary*, 34 Can. B. Rev. 769, 790 (1956). See also, Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609-11 (1947). Significantly, Professor Frank's opinions on disqualification are reflected in 28 U.S.C. § 455. See Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 L. & Contemp. Prob. 43, 44 (1970), where the author recognizes the rule as an integral part of any disqualification statute.[11]

The rule of necessity has been applied consistently by this Court[12] and by State[13] and lower federal[14] courts, includ-

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[11] The Senate and House Reports also refer to Professor Frank's testimony, S.Rep. 419, 93rd Cong., 1st Sess. (1973) at 3; H. Rep. 1453, 93rd Cong., 1st Sess. (1974) at 3.

[12] *Evans* v. *Gore*, 253 U.S. 245 (1920). See also, *Miles* v. *Graham*, 268 U.S. 501 (1925); *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939); and *North American Co.* v. *SEC*, 327 U.S. 686 (1946), discussed at ASG Bf. at 28, n. 17.

[13] *Olson* v. *Cory*, 609 P.2d 991 (Cal. 1980); *McCoy* v. *Handlin*, 153 N.W. 361 (S.D. 1915); *State ex rel. Gardner* v. *Holm*, 62 N.W.2d 52 (Minn. 1954); *Higer* v. *Hansen*, 170 P.2d 411 (Idaho

ing cases involving judicial salaries.[15] It has been applied since the enactment of § 455 and in the presence of disqualification statutes similar to § 455.

Appellant's brief carefully analyzes the legislative history of 28 U.S.C. § 455 and concludes that the statute is not intended to require disqualification in this case, a conclusion with which appellees fully agree. (Motion to Affirm filed in Appeal No. 79-1683 at 8-13). After exhaustive research, the Solicitor General, on behalf of the United States, reached the same conclusion in *Atkins* v. *United States,* (No. 75-1728, On Certificate From the United States Court of Claims). The plaintiffs in that case agreed. (See No. 75-1728, Brief on the Question of Disqualification). Subsequent research has uncovered no instance in which a disqualification provision prevented a case from being heard. Indeed, if such a result were intended, to that extent, § 455 would unconstitutionally foreclose access to the courts to a group of citizens.[16]

1946); *State ex rel. Mitchell* v. *Sage Stores Co.,* 143 P.2d 652 (Kan. 1943); *Gordy* v. *Dennis,* 5 A.2d 69 (Md. 1936).

[14] *Duplantier* v. *United States,* 606 F.2d 654, 662-63 (5th Cir. 1979) *cert. pending* No. 79-1180; *Atkins* v. *United States,* 556 F.2d 1028, 1039-1040 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978); *Pilla* v. *American Bar Ass'n,* 542 F.2d 56, 58-59 (8th Cir. 1976); *Foley* v. *Carter,* F.Supp. (D.D.C. 1980), appeal pending, Nos. 80-1548, 80-1551 (D.C. Cir. filed May 21, 1980). *United States* v. *Corrigan,* 401 F.Supp. 795 (D.Wyo. 1975).

[15] See, *Evans* v. *Gore, Miles* v. *Graham* and *O'Malley* v. *Woodrough,* note 12 *supra; Olson* v. *Cory, McCoy* v. *Handlin* and *State ex rel. Gardner* v. *Holm,* note 13 *supra;* and *Atkins* v. *United States,* note 14 *supra.*

[16] See Reddish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U.Pa. L. Rev. 45, 49 (1975). See also *Battagalia* v.

Appellees further submit that any suggestion that the disqualification statute was intended to overturn the rule of necessity and forever close the door to consideration of appellees' claims would suggest consequences which go well beyond this case. Suppose, for example, that Congress enacted a statute reducing the salary of every judge by one-half or shortening every federal judge's term to ten years. Such legislation would obviously be unconstitutional. Yet, if no judge could hear the case, the unconstitutional statute would survive without challenge, and the rights of the public, for whom the protections of Article III are intended, would be totally frustrated.

Accordingly, appellees respectfully submit that the district court and this Court have jurisdiction in these cases and the Justices of this Court are not disqualified from hearing and deciding these appeals.[17]

II. AS A MATTER OF STATUTORY CONSTRUCTION, THE CHALLENGED LIMITATIONS DID NOT AFFECT JUDGES' RIGHTS TO THE ANNUAL SALARY ADJUSTMENTS MANDATED BY THE STATUTES DEFINING JUDICIAL COMPENSATION.

Appellees agree with appellant that affirmance of the district court on statutory grounds would "obviate the need for the Court to consider the constitutional issues

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General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948), *cert. denied* 335 U.S. 887 (1948); *Crowell* v. *Benson*, 285 U.S. 22, 60 (1932); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 83 (1936) (Brandeis, J., concurring); *Brinkley* v. *Hassig*, 83 F.2d 351 (10th Cir. 1936).

[17] We do not read the rule of necessity as imposing a "duty to sit" in this case if an individual Justice feels personally compelled to disqualify himself. In that instance, the remaining Justices should decide the case.

presented."[18] (ASG Bf. at 32) Appellees submit, however, that the significance of the constitutional questions presented and the importance of resolving them and obviating any such future litigation mandates that resolution of these cases not be limited to affirmance of the district court on non-constitutional grounds.[19] Under these circumstances, appellees urge this Court to determine, as did the court below, that the right to an annual salary adjustment provided by statute is an integral part of a judge's salary protected by the Compensation Clause of Article III, section 1, and may not, therefore, be withheld.

A. None Of The Funding Limitations Rescinded Judges' Rights To The Annual Salary Adjustments

The principal non-constitutional ground for upholding appellees' rights to pay adjustments is the fundamental proposition that appropriations funding limitations relate solely to the use of appropriated funds and do not constitute amendments to or repeals of existing statutes. Applied here, the right to a salary adjustment set by statute remains unaffected and enforceable. These appeals thus present the non-constitutional issue: did the challenged provisions merely restrict the use of funds or did they somehow substantively amend, repeal or supersede the Adjustment Act.

Appellees submit that, notwithstanding the appropriations restrictions, judges' salary levels were adjusted on October 1 of each year and the right to full payment survived. Since appellees were paid less than the amounts to

[18] The converse is, of course, not true.

[19] Appellees are not unmindful of the well-established rule that constitutional questions should be avoided if a dispositive non-constitutional ground is available. *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 582 (1978). We submit, however, that the "special considerations in this case mandate" resolution of the constitutional issues as well. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 122 (1979).

which they were entitled by statute, they may recover the difference as a presently due and unpaid obligation of the United States payable out of funds appropriated for such claims reduced to judgment.

In resisting this contention, appellant does not claim that there was a specific repeal of the Adjustment Act in any year, but rather that the temporary funding limitations accomplished that purpose *by implication.* There is no authority to support this position.

The rule against repeals by implication—and that is precisely what the ASG contends occurred—has consistently been applied by this Court and by lower federal courts. See *Morton* v. *Mancari,* 417 U.S. 535 (1974); *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153 (1978); *United States* v. *United Continental Tuna Corp.,* 425 U.S. 164 (1976).[20] Moreover, as this Court noted in *Tennessee Valley Authority v. Hill,* this "cardinal rule" applies "with even greater force when the claimed repeal rests solely on an Appropriations Act." 437 U.S. at 190. The reason for this stems from the recognition that neither a limitation on the use of funds nor the appropriation of funds for a specified purpose has the effect of repealing or suspending an existing statute.

The funding limitations which appellant contends superseded judges' rights under the applicable pay statutes were, in three of the four years at issue (fiscal 1977, 1979 and

[20] Other cases applying the rule against repeals by implication include: *Kenai Peninsula Borough* v. *State of Alaska,* 612 F.2d 1210 (9th Cir. 1980); *Southern Capital Corp.* v. *Southern Pacific Co.,* 568 F.2d 590 (8th Cir. 1978); *United States* v. *John,* 560 F.2d 1202 (5th Cir. 1977); *Liberty Alliance of the Blind* v. *Califano,* 568 F.2d 333 (3rd Cir. 1977); *Gresham* v. *Chambers,* 501 F.2d 687 (2nd Cir. 1974); *Abell* v. *United States.* 518 F.2d 1369 (Ct. Cl. 1975); *Maynor* v. *Morton,* 510 F.2d 1254 (D.C. Cir. 1975); *West Virginia Division of The Izzak Walton League of America, Inc.* v. *Butz,* 522 F.2d 945 (4th Cir. 1975).

1980), "temporary" limitations contained in appropriations acts. The fiscal 1977 and 1979 Appropriations Acts provided funds for the *Legislative Branch*. The fiscal 1980 appropriations limitation was contained in Joint Resolution No. 412, Pub. L. No. 96-86, which provided continuing appropriations for fiscal 1980 to a number of *other federal agencies* whose prior appropriations had terminated with the close of the fiscal year, September 30, 1979. In all four years in question, funds for judicial salaries were provided under separate appropriations bills applicable to the Judicial Branch.[21]

The limitation on payment of the fiscal 1978 adjustment is found in a separate non-appropriations measure, Pub. L. No. 95-66, enacted July 12, 1977. Appellees submit that the unique circumstances reflected in the legislative history of this statute, combined with the well-established presumption against repeals by implication, lead to the conclusion that Pub. L. No. 95-66, like the appropriations acts, merely withheld the payment of salary adjustments, and did not amend or repeal the Adjustment Act. See discussion at 39-40 *infra*.

Fiscal 1977. The 4.8% adjustment for fiscal 1977 was not disapproved by Congress (5 U.S.C. § 5305(2)(e)) and went into effect on October 1, 1976. The annual salary of a district judge was thereby established at $44,000.[22] Later that same

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[21] Appropriations for the Judicial Branch were provided under Pub. L. No. 94-362, approved July 14, 1976 for fiscal 1977; by Pub. L. No. 95-86, approved August 2, 1977 for fiscal 1978; by Pub. L. No. 94-341, approved October 10, 1978 for fiscal 1979; and by Pub. L. No. 96-68, approved September 24, 1979 for fiscal 1980.

[22] In the District Court, appellant acknowledged the validity of the argument that "at least for a few hours" judges were earning adjusted amounts, *i.e.*, $44,000 for district judge. (See p. 43, n. 47, *infra*).

day, the President signed into law the 1977 Appropriations Act which prohibited the use of funds to pay the adjustment to certain officials, including judges.

Fiscal 1979. Similarly, Congress did not disapprove the salary adjustment of 5.5% for fiscal 1979. However, on September 30, 1978, the 1979 Appropriations Act was approved, providing that no appropriation could be used to pay that adjustment to the same small group of federal officials, including judges. The ASG concedes that both the fiscal 1977 and fiscal 1979 limitations were "temporary" only and [if ever valid] expired at the close of those fiscal years. With respect to fiscal 1979, appellant concedes that judges became entitled to this adjustment effective October 1, 1979, (the first day of fiscal 1980) at the latest. (ASG Bf. at 12.)

Fiscal 1980. On August 30, 1979, the President submitted to Congress an adjustment of approximately 7% to become payable October 1, 1979. Appellant concedes that this adjustment was payable on October 1, 1979. (ASG Bf. at 12). The aggregate of the 1979 and 1980 adjustments resulted in a total salary adjustment commencing October 1, 1979 of 12.9% over the rates at which judges were being paid prior to October 1, 1979. Then, on October 12, 1979, Congress adopted Pub. L. No. 96-86, a Joint Resolution intended to provide appropriations for certain agencies other than the Judicial Branch, which included a proviso that, for the year 1980, "funds available for payment to executive employees, which includes Members of Congress *who under existing law are entitled to approximately 12.9 percent increase in pay,* shall not be used to pay any such employee or . . . official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year." (79-1689, J.S. App. 23a-26a) (emphasis supplied).

With respect to each of the years in question, appellees submit that the limitations merely restricted the use of funds for the full payment of the lawful salaries of judges, without altering their entitlement to those salaries. The ASG maintains that each of these limitations on the use of funds somehow resulted in a substantive amendment or temporary repeal of a general statute—the Adjustment Act—preventing its operation in each of the years in question. Thus, the ASG contends that appellees' salary levels were *not adjusted* in any of the years in question as required by the applicable statutes, and that accordingly judges have been paid the full amount to which they were statutorily entitled. The position of appellant in this regard is at odds with the views of an impressive array of authoritative opinions:

1. *Appellant's position is contrary to the opinions of two Presidents.* Simultaneous with the signing of the 1977 Appropriations Act containing the restriction on the use of current appropriations, President Ford issued Executive Order No. 11941 reflecting judicial salaries *as adjusted.* Similarly, in October, 1978, President Carter, in issuing Executive Order No. 12087 pertaining to the fiscal 1979 adjustments, officially advised that judicial salaries were adjusted to stated levels under the provisions of the Adjustment Act.[23] Both Executive Orders bear the notation that, because of the limitations imposed under the referenced appropriations acts, "funds are not available to pay" salaries at the adjusted rates.

2. *Appellant's position is contrary to the opinion of Congress itself.* In adopting Pub. L. No. 96-86 for fiscal 1980, Congress acknowledged that the limitation in the 1979 Appropriations Act, Pub. L. No. 95-391, had not prevented the

[23] *Fiscal 1977:* Exec. Order 11941, 3 CFR § 151 (1976 Comp.); see Schedule 7.

Fiscal 1979: Exec. Order 12087, 3 C.F.R. § 234 (1978 Comp.); see Schedule 7.

adjustment. The 5.5% adjustment effective October 1, 1978, was part of the "12.9 percent increase in pay" to which Congress acknowledged judges were "entitled". By its explicit recognition that judges were "entitled" to the previous year's adjustment, Congress clearly declared that the fiscal 1979 limitation related only to the use of funds and did not prevent the adjustment in salary levels. The same rationale applies to the other years in question. See, ASG Bf. at 40-41, n. 33.

3. *Appellant's position is contrary to the opinion of the Comptroller General of the United States.* In interpreting the limitation contained in the 1977 Appropriations Act, the Acting Comptroller General declared:

> The language [of the Act] does not suspend or postpone the operation of Public Law 94-82 [the Adjustment Act] and *is not therefore a limitation on the rates of pay established thereunder.* The language sets a limitation on the use of funds. By its terms it restricts the use of funds otherwise available . . . . (J.A. 23a) (emphasis supplied).

4. *Appellant's position is contrary to the opinion of the Office of Personnel Management.* Through OPM letter 531-54, dated October 12, 1979, OPM determined that Section 304 of Pub. L. No. 95-391 [the 1979 Appropriations Act] was merely a "restriction on the use of appropriated funds to pay increases in pay to certain federal officers . . . ." The OPM letter concluded that the lawful rates of pay were the adjusted rates; they became payable on October 1, 1979, after the temporary restriction on the use of funds contained in § 304 "expired."

5. *Appellant's position is contrary to the opinion of the Administrative Office of the United States Courts.* In a Bulletin[24] issued less than two weeks after the passage of

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[24] Bulletin No. 492, Supplement No. 24, issued Ocober 11, 1976; J.A.18a-19a.

the 1977 Appropriations Act, the Administrative Office advised all judges that, pursuant to the provisions of the Adjustment Act, judicial salaries *were adjusted.* It further advised that, because of the restrictions in the 1977 Appropriations Act, funds were not available to pay salaries at the adjusted rates.

6. *Appellant's position is contrary to the Rules of both the Senate and the House of Representatives.* As this Court recognized in *Tennessee Valley Authority* v. *Hill, supra,* 437 U.S. at 190, both the Senate and the House of Representatives have rules against the use of appropriations measures to amend general statutes.[25] Each of the appropriations bills which contained an appropriations limitation here at issue also contained numerous other provisions, some of which were challenged under Senate and House Rules as constituting attempts to enact "general legislation" through appropriations bills.[26] No member of Congress claimed that the funding limitations here involved were amendments to 28 USC § 135, the Adjustment Act or any other general statute.[27]

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[25] See also, *Environmental Defense Fund, Inc.* v. *Froehlke,* 473 F.2d 346, 355 (8th Cir. 1972).

[26] See comments of Senator Stevens, 122 Cong. Rec. 29348-29366; Senator Wirth, 122 Cong. Rec. 28865; Representative Addabbo, 122 Cong. Rec. 31892; and Representative Riegle, 122 Cong. Rec. 31896.

[27] The ASG incorrectly suggests that Representative Wirth considered the fiscal 1977 limitation to be substantive legislation. On the contrary, Mr. Wirth specifically advised that appropriations measures should concern "the level of funds to be spent" and should not "go beyond these basic funding decisions. . . ." His comments did not concern the appropriations limitation in issue, but related instead to other amendments to the appropriations bills that concerned more than simply the "level of funds to be spent." 122 Cong. Rec. 28865.

Significantly, House Rule XIII (Clause 3) provides:

> Whenever a committee reports a bill or a Joint Resolution repealing or amending any statute or a part thereof it shall include in its report or in the accompanying document (1) the text of the statute or part thereof which is proposed to be repealed. . . .

The Reports issued by the House Appropriations Committee in compliance with this rule do not refer to the limitations as amending or repealing existing statutes.

In its Report on the 1979 Appropriations Act, the Committee (in a subsection identified in bold blocked letters as "COMPLIANCE WITH RULE XIII—CLAUSE 3") unequivocally states: "there are no instances in the bill where statutes or parts thereof are repealed or amended."[28] The Committee's Report for Joint Resolution 412 (fiscal 1980)[29] (in an equally prominent subsection) lists three provisions in that Resolution that were understood to amend or repeal all or a part of other statutes. There is no reference to any statute dealing with judges' pay or any limitation thereon.[30]

7. *Appellant's position is contrary to well-established principles of appropriations law and rules of statutory construction.* As previously noted, it has long been accepted

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[28] H. Rep. 1254, 95th Cong., 2nd sess. at 39 (1978).

[29] H. Rep. 500, 96th Cong., 1st sess. (1979).

[30] The ASG points to the fact that each of these limitations was listed in the respective Reports under the sub-heading "Changes In The Application Of Existing Law" (ASG Bf. at 44 and 46). This fact is not surprising; the restrictions at issue obviously constitute changes in the "application" of existing law to the extent that they represented a refusal to permit appropriated funds to be used for payment of an obligation created under another statute. But the House Committee on Appropriations clearly stated that the funding limitations did not repeal or amend any statute, including the Adjustment Act, and it is misleading for the ASG to imply otherwise, without even mentioning the Reports' references to Rule XIII. The reports could not be more explicit on this point.

that appropriations measures will not be viewed as having amended a general statute, in the absence of the clearest expression of congressional purpose and intent. *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 783 (D.C. Cir. 1971).[31]

In Gibney v. *United States*, 114 Ct. Cl. 38 (1949), an Immigration Inspector sued under a law authorizing overtime pay. Defendant argued that a 1948 appropriations act, which contained a proviso that none of the funds appropriated for the Immigration and Naturalization Service could be used to pay compensation for overtime services, had repealed plaintiff's right to this compensation. The *Gibney* court disagreed:

> [A] pure limitation in an appropriation bill does not have the effect of either repealing *or even suspending an existing statutory obligation* any more than the failure to pay a note in the year in which it was due would cancel the obligation stipulated in the note. . . . 114 Ct. Cl. at 50 (emphasis supplied).

The same result was reached in *Lovett* v. *United States*, 66 F.Supp. 142 (Ct. Cl. 1945);[32] *Andrew Geddes* v. *United*

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[31] Defendant's reliance upon *City of Los Angeles* v. *Adams*, 556 F.2d 40 (D.C. Cir. 1977), is misplaced. In *Adams*, neither plaintiff nor defendant contended that the right to reimbursement for expenditures made in one year, although limited by the amount of that year's appropriations, would become payable in subsequent years. In the instant case, however, it is conceded, for example, that the fiscal 1979 adjustment of 5.5% became payable, at the latest, on October 1, 1979, when the appropriations limitation expired.

[32] That case held that the effect of a proviso limiting the use of funds to pay certain federal employees for services performed after a specified date was merely to withhold payment and not to extinguish the obligation.

States, 38 Ct. Cl. 428 (1903);[33] and *United States* v. *Langston*, 118 U.S. 389 (1886), where the Court held there was nothing in the language of three appropriations acts which could be construed as repealing the express language of the statute fixing $7,500 as plaintiff's salary. Accordingly, the Court held that the appropriations acts did not repeal or amend the salary statute and that plaintiff's judgment constituted a valid claim against the United States, payable out of funds to be appropriated for such claims.[34]

United States v. *Dickerson*, 310 U.S. 554 (1940), relied upon by appellant, demonstrates the kind of legislative history that is required before a court will entertain a claim that an appropriations bill has suspended the operation of another statute. In *Dickerson*, the plaintiff sought to recover the amount of a reenlistment bonus claimed to be due under a 1922 statute, which had remained in effect until the enactment of § 18 of the Economy Act of March 3, 1933. The latter statute, which was *not* an appropriations measure, explicitly provided that the 1922 Act, to the extent it allowed for payment of reenlistment bonuses, "is hereby suspended as to reenlistments made during the fiscal year ending June 30, 1934." Identical legislation was enacted in each of the fiscal years 1935, 1936 and 1937. Then in 1938 and 1939, annual appropriations bills specifically referred to the 1922 statute and barred reenlistment allowances "notwithstanding the applicable provisions of §§ 9 and 10 of the [1922] Act." The legislative history of the 1938 and

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[33] "Neither is a public officer's right to his legal salary dependent upon an appropriation to pay it . . . the real question before the Court is that of the claimants' legal right to receive the pay . . . ." 38 Ct. Cl. at 444. *Accord, Byron Brown Ralston* v. *United States*, 91 Ct. Cl. 91 (1940) *cert. denied*, 311 U.S. 687 (1940).

[34] The *Langston* decision was discussed favorably in *Belknap* v. *United States*, 150 U.S. 588, 594 (1893), a decision relied upon by appellant.

1939 appropriations measures made it clear that they were meant to continue the "suspension of the reenlistment gratuity for enlisted personnel. . . ." 310 U.S. at 557.

In the instant case, it is conceded that the limitations were "temporary" only, expiring at the end of each fiscal year. (ASG Bf. at 41, n. 33). For example, if the Adjustment Act had been "suspended", the October 1, 1978 adjustment of 5.5% would have never taken effect. But as has been recognized by everyone, including appellant, the fiscal 1979 adjustment was not only in effect but was payable, at the latest, on October 1, 1979.

Two lower court cases relied upon by the ASG deserve separate attention in light of this Court's recent decisions in *Harris* v. *McRae,* No. 79-1268, and *Williams* v. *Zbaraz,* Nos. 79-4, 79-5 and 79-491. (Opinions Announced June 30, 1980). In support of the claim that the challenged appropriations measures constituted substantive amendments to the Adjustment Act, the ASG cites *Preterm, Inc.* v. *Dukakis,* 591 F.2d 121, 133-134 (1st Cir. 1979), *cert. denied,* 441 U.S. 952 (1979) and *Zbaraz* v. *Quern,* 596 F.2d 196, 200-202 (7th Cir. 1979).

Both *Preterm and Zbaraz* considered whether the "Hyde Amendment" to the Department of Health, Education and Welfare appropriations bill (prohibiting use of federal funds for abortions, except under limited circumstances) substantively amended Title XIX of the Social Security Act, 79 Stat. 443, as amended, 42 U.S.C. § 1396, *et. seq.* (1976 ed. and Supp. II). Both courts believed that if it did not, participating States would be obliged to fund entirely all medically necessary abortions for which federal funds were withheld under the Hyde Amendment. After examining the legislative history, both courts concluded that a substantive change in Title XIX was

affected by the Hyde Amendment. When the same question was presented to this Court in *Harris* v. *McRae,* and *Williams* v. *Zbaraz,* however, this Court disagreed even with the need to amend Title XIX, and found that Title XIX was never intended to impose a unilateral funding obligation upon participating States for any health service.

Since it was unnecessary to amend Title XIX, it follows that the courts of appeals decisions relied upon by the ASG were incorrect in holding that the appropriations limitation (the Hyde Amendment) either amended or was "intended" to amend the general statute (Title XIX of the Social Security Act).

The force of the rules proscribing substantive enactments within appropriations measures and disfavoring repeals by implication are demonstrated by *Tennessee Valley Authority* v. *Hill, supra.* There, annual appropriations for construction of the Tellico Dam were held not to have caused a substantive change in the applicable provisions of the Endangered Species Act of 1973, 16 U.S.C. § 1531. The project in question, which was virtually completed by the time suit was filed, had been commenced seven years *prior* to the passage of the Endangered Species Act; funds had been appropriated for its construction in each of the years after passage of the Act, including an appropriation passed after the court of appeals had held that the provisions of the Endangered Species Act precluded completion and operation of the dam.

In holding that the provisions of the Endangered Species Act controlled, this Court found that "[t]here is nothing in the appropriations measures, as passed, which states that the Tellico project was to be completed irrespective of the requirements of the Endangered Species Act". 437 U.S. at 189. The Opinion emphasizes the "cardinal rule"

that repeals by implication are not favored and stresses that this rule "applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act."[35] *Id.*

The strength of the *Hill* decision is highlighted by appellant's effort to distinguish it. (ASG Bf. at 34, n. 25). The first difference claimed by appellant is that the Adjustment Act establishes "governmental obligations" which are enforceable in court; accordingly, appellant contends that the Adjustment Act must have been amended, for it is not "plausible" that Congress would refuse to appropriate funds and yet leave the obligation outstanding. The obvious answer to this bootstrap argument is that appellant's idea of "implausibility" has not been shared by the Legislative Branch in the past, for Congress did precisely what the ASG claims is not "plausible" in *Gibney* v. *United States, supra, Lovett* v. *United States, supra; Andrew Geddes* v. *United States, supra; United States* v. *Langston; supra,* and numerous other instances.

Appellant further attempts to distinguish *Hill* on the ground that the instant case "does not truly involve a repeal by implication, because there is at best a minor distinction between substantive and appropriations legislation in the context of expenditures for federal salaries." (*Id.*) Yet, this so-called "minor distinction" did not prevent plaintiffs Gibney, Lovett, Geddes and Langston, all federal employees, from recovering their compensation after a refusal to appropriate funds. In essence, the ASG contends (without support) that the right to a salary is contingent upon Congress' willingness to appropriate necessary

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[35] Notwithstanding appellant's intimation to the contrary, there is no question that Congress was well aware of the relationship between the Endangered Species Act and completion of the Tellico Dam at the time funds were appropriated for its completion. See H. Rep. 379, 95th Cong., 1st Sess. (1977).

funds to pay it. The Congressional Research Service recently concluded to the contrary and stated that there exists "no precedent for a contention that the entitlement to compensation of judges which cannot be reduced arises only with the enactment of an appropriations bill." CRS at 24.[36]

8. *Contrary to appellant's contention, the legislative history does not reflect a clear and manifest intent to amend, repeal or supersede the Adjustment Act.* Against this overwhelming authority, the ASG urges the Court to find a "congressional intent" to amend or repeal the Adjustment Act in each of the years in question, arguing that the legislative history is clear and unambiguous[37] in this respect, and that a contrary construction "merely to withhold funding for salary adjustments would defeat the very objectives expressly advanced by Congress in support of the statute." (ASG Bf. at 35).[38] While it is not appellees' burden to

[36] The Library of Congress, Congressional Research Service, Killian, J., *Diminution of Judicial Salaries—A Consideration Of The Constitutional Issue Raised By The Action Of Congress With Respect To Judicial Salaries.* (November, 1979) reprinted at 125 Cong. Rec. 16706 (November 15, 1979) [hereinafter cited as *"Diminution of Judicial Salaries"* or "CRS"].

[37] Throughout its brief, appellant points to statements made during the debates characterizing the refusal to appropriate funds as a means to "delay", "block", "limit", "withhold" or "freeze" salaries. Indeed, the term "freeze" is quoted in appellant's brief no less than 20 times in connection with the three appropriations measures. These terms are not precise, unequivocal or definitive. In fact, they would appear more properly to describe a temporary restriction on the use of funds rather than a substantive amendment, modification or repeal of an existing statute.

[38] With respect to the "very objectives expressly advanced by Congress", it should be noted that the principal concern expressed during the debates is not even discussed by the ASG—i.e., the adverse political consequences feared by Members of Congress each

establish that the appropriations measures here involved were *not* intended to modify the Adjustment Act—that is presumed to be the case—the extent to which the ASG's presentation misconstrues the legislative history proves the wisdom of the well-established presumption against amendments or repeals by implication.[39]

Even those who favored the limitations understood that the Adjustment Act was not thereby being repealed.[40] In this regard, the remarks of Senator Hollings, whose views are cited by the ASG, reflect this clearly. In addition to stating his understanding that the 1977 appropriations restriction was merely a limitation on the use of funds, 122 Cong. Rec. 15341, Senator Hollings adopted and caused to

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time the congressional pay issue is presented. See, comments of Representatives Shipley, Armstrong and Graffley with respect to the Shipley amendment (fiscal 1977) at 122 Cong. Rec. 28872-28873; comments of Representatives Harris, VanderVeen and Spellman at 122 Cong. Rec. 28879-28880; comments of Senator Taft, 122 Cong. Rec. 29132, Senator Hollings, *Id.* at 29133, Senator Stevens, *Id.* at 29165, Senator Stennis, *Id.* at 29180, and Senator Muskie, *Id.* at 29171.

[39] In a number of instances throughout its brief, appellant has seen fit to delete from quoted materials, words, phrases and, in some instances, sentences which would reduce the strength of appellant's arguments. See, for example, ASG Bf. at 37-38, n. 29, where the ASG selectively deletes express references to legislators (*e.g.*, "Members of Congress", "Members", etc.) which show opposition to automatic salary adjustments for *themselves*. This practice is evident throughout appellant's brief and tends to present a less than accurate view of what was actually said or not said on a given occasion.

[40] Remarks of Representative Grassley, 122 Cong. Rec. 28873; Senator Helms acknowledged that "this bill is not as satisfactory as an outright repeal of the Act which allows the automatic salary increases." 122 Cong. Rec. 29171. Moreover, other bills were then pending which would have substantively repealed the Adjustment Act (Rep. Grassley, 122 Cong. Rec. 28873; Rep. Harris, 122 Cong. Rec. 28879).

be published in the Congressional Record the views of Acting Comptroller General Keller:

> The language [limiting the use of funds] does not suspend or postpone the operation of Public Law 94-82 and it is not therefore a limitation on the rates of pay established thereunder. The language sets a limitation on the *use of funds.*
>
> Since Executive Schedule positions are specified in section 225(f), individuals in those positions could not *receive* the pay increase. *But the legal rates for Executive Schedule offices and positions would still be the rate set by the President* . . . . 122 Cong. Rec. 31860-31861, J.A. 23a. (emphasis supplied).

Similarly, with respect to the fiscal 1979 salary adjustment, the legislative history shows no congressional intent to amend or repeal the Adjustment Act. As previously noted, even appellant agrees that this adjustment took effect, at the latest, after the close of the 1979 fiscal year. Thus, the restriction did not "supersede" the operation of the Adjustment Act as appellant inconsistently maintains.[41]

With respect to fiscal 1980 (Joint Resolution 412), it is difficult to understand any basis for appellant's argument that the "legislative history [of the Joint Resolution] . . .

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[41] The ASG notes (ASG Bf. at 44-45, n. 36) that the 1979 Appropriations Act provided that, where the amount of any employee deduction or contribution is determined "on the basis of a rate of salary or basic pay, the rate of salary or basic pay *payable* . . . shall be treated as the rate of salary or basic pay [for purposes of computing such deduction or contribution]. (emphasis supplied). This does not confirm, as the ASG claims, that the fiscal 1979 restriction was a substantive enactment. It shows quite the opposite. If the limitation for fiscal 1979 had prevented the adjustment from taking effect, as the ASG claims, the proviso would have been wholly unnecessary; there would have been no difference between the amount payable and the lawful rate of pay.

confirms that the legislation constituted a substantive enactment." (ASG Bf. at 46). Representative Whitten, Chairman of the House Committee on Appropriations, noted that the resolution did not grant a 5.5% "salary raise" since the "law provides for definite increases . . . . The estimate is that the law provides now for a 12.9% increase in pay." 125 Cong. Rec. H8134.[42]

Moreover, the October 12, 1979 Resolution contained the proviso that if any employee accepted the 5.5%, that acceptance would be "in lieu of the 12.9% due for such fiscal year." The record shows that the Resolution's sponsors viewed this proviso as a means of establishing a settlement and compromise of otherwise valid claims for 12.9% by employees who accepted the 5.5% salary adjustment.[43]

Thus, contrary to appellant's contention, the legislative history does not disclose a clear and manifest intent to amend or repeal the Adjustment Act or any other statute. And, significantly, the applicable House Committee Reports do not list the pay limitations among the provisions which amended or repealed all or part of any other statute.[44]

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[42] See also the remarks of Representative Whitten at 125 Cong. Rec. H8135, H8457 and those of Representative Latta at 125 Cong. Rec. H8850.

[43] See remarks of Representatives Whitten, Hanley and Barnes at 125 Cong. Rec. H8446, H8448 and H8451, respectively. Similarly, Senator Stevens noted that "we have a pay adjustment of 12.9%. . . . [W]e have judges getting 12.9% for the rest of their lives. There is nothing we can do about that." 125 Cong. Rec. S14486. See also the remarks of Senator Magnuson at 125 Cong. Rec. S14483 and S14490.

[44] Appellant also argues that the circumstances surrounding passage of the Joint Resolution were "highly unusual" and "unprecedented" and that "Congress was unable to pass the Pay Act before the salary increases for fiscal year 1980 had become effective." (ASG Bf. at 36, n. 27). This contention is not supported by the

Fiscal 1978. As previously noted, the restriction on payment of the fiscal 1978 salary adjustment was not contained in an appropriations measure, as such. Pub. L. No. 95-66 simply provided that the next adjustment after passage of that statute on July 11, 1977, "shall not take effect." It is submitted that this Act, like the three appropriations measures, did not supersede the Adjustment Act, but merely withheld payment of the statutorily mandated salary adjustment.

The record leaves no doubt of the symbiotic relationship between S. 964 [which later became Pub. L. No. 95-66] and a proposed amendment to the Legislative Branch Appropriation Act of 1978. The former was debated and passed by the House on June 28, 1977, one day prior to House consideration of a proposed amendment to "roll back" *congressional* salary increases which had been granted a few months earlier pursuant to the Federal Salary Act.[45] Under these circumstances (particularly when read against the history of the Adjustment Act and the well-established presumption against repeals by implication), it cannot be presumed that Congress intended to repeal the Adjustment Act. Had it so intended, it would have done so by clear and unequivocal language specifically repealing that Act. In-

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record and is, in fact, absurd. There is no reason why Congress could not have enacted a separate statute prior to October 1, *explicitly* repealing the fiscal 1980 adjustment, though, had it done so, appellees' constitutional argument would still remain.

[45] See remarks of Representatives Salarz, Whalen and Rousselot. 123 Cong. Rec. 21121-21123. This proposed "roll-back" amendment is also significant to other issues on appeal. It excluded federal judges, and demonstrated Congress' understanding of the limits which Article III, section 1 imposes on its power to regulate judicial salaries. See remarks of Representatives Bolling, Bauman and Anderson, 123 Cong. Rec. 21362, and Representative Udall, 123 Cong. Rec. 21387.

deed, repealing legislation was pending in Congress at the time Pub. L. No. 95-66 was enacted.[46]

The ASG argues that, unlike the appropriations measures at issue in the remaining three years, "the 1977 Act [Pub. L. No. 95-66] was not an appropriations measure at all, but rather a substantive enactment that provided that the cost-of-living increases contemplated for October 1977, including increases under 28 U.S.C. 461 for Article III judges, 'shall not take effect' . . . ." (ASG Bf. at 41).

While appellees believe that Pub. L. No. 95-66 should be viewed solely as a temporary withholding of the fiscal 1978 salary adjustment, the distinction suggested by the ASG between that statute and the restrictions contained in the appropriations measures applicable to fiscal 1977, 1979 and 1980, represents a significant concession regarding the latter three measures. In effect, the ASG is saying that the difference between Pub. L. No. 95-66 and the other three enactments is that the former statute constitutes a substantive change—an amendment or repeal of the applicable provisions of the Adjustment Act for the 1978 fiscal year. By inference then, the others do not. If that is appellant's view of what differentiates Pub. L. No. 95-66 from the appropriations measures, it follows that, on non-constitutional grounds, appellees are summarily entitled to the relief sought in the first count of Will I and in both counts of Will II, even under the ASG's statutory analysis.

In short, the position maintained by appellant with respect to the claimed substantive nature of the challenged provisions is contradicted by their legislative history, is contrary to the views expressed by two Presidents, government agencies and the Congress, and is inconsistent with some of the

[46] See, remarks of Representative Ammerman at 123 Cong. Rec. 21125.

views expressed by appellant itself in this Court and in the court below. Appellees have presented valid non-constitutional claims against the United States for the payment of the full salaries to which they are entitled under the applicable pay statutes.

B. The Fiscal 1980 Limitation (Adopted October 12, 1979) Does Not Apply To The Judiciary

An additional non-constitutional ground for affirmance exists with respect to fiscal 1980. Pub. L. No. 96-86 specifically refers only to "funds available for payment to *executive employees, which includes members of Congress* who under existing law are entitled to approximately 12.9 percent increase in pay. . . ." (emphasis supplied). Pub. L. No. 96-86 makes no reference to the Judiciary and, significantly, leaders of Congress acknowledged that the limitation could not be applied to federal judges. 125 Cong. Rec. S14486. Appellees submit that this limitation did not apply to the Judicial Branch.

It is well established that the language of a statute controls unless there is some ambiguity. This "plain meaning" rule is a basic principle of statutory construction. 2A. Sutherland, Statutory Construction, § 48 (4th ed. 1973); *Tennessee Valley Authority* v. *Hill, supra,* 437 U.S. at 184, n. 29.

The "plain meaning" of the term "executive employees" clearly limits those affected to employees of the executive branch. The term is followed by the phrase "which includes Members of Congress", indicating further that Congress recognized its members would not be considered "executive employees" and that if they were to be subject to the 5.5% limitation, it was necessary to specify that fact. If Congress had intended that federal judges be subject to the 5.5% limitation, it could have easily made this clear by adding the phrase "and federal judges." It did not do so and, in

the absence of such specificity, Pub. L. No. 96-86 should not be read to include federal judges. Appellant's contention (ASG Bf. at 49) that "executive employees" is a term of art which should be read to include all persons covered by the Adjustment Act ignores the fact that, if so, it would have been entirely unnecessary to include specific reference to "Members of Congress", as they too are covered by the Adjustment Act.

That the limitation does not apply to judges is also clear from the comments of Members of Congress in adopting the Act. Many Members acknowledged that the "roll back" of salaries to levels below those in effect between October 1, 1979 and October 11, 1979, could not apply to judges. Senator Stevens, one of the Senate managers of the Joint Resolution, described the judges' pay situation as of that date:

> We have a pay adjustment now of 12.9 percent. Because of the failure to put on a pay cap, we have judges getting 12.9 percent for the rest of their lives. There is nothing we can do about that. 125 Cong. Rec. S14486.

Senator Stevens also commented that "we have a situation where one branch of the Government has received a 12.9 percent increase in salary, *and we will never lower that.*" (*Id.* at 14487). (emphasis supplied).

III. THE ANNUAL COST-OF-LIVING SALARY ADJUSTMENT IS AN INTEGRAL PART OF JUDICIAL COMPENSATION, THE WITHHOLDING OF WHICH VIOLATES ARTICLE III, SECTION 1 OF THE CONSTITUTION.

In each of the fiscal years 1977, 1978, 1979 and 1980 Congress withheld a portion of the compensation to which

judges were entitled by law, and thereby diminished their compensation protected by Article III, section 1. Whether this was accomplished by temporary limitations on the use of current appropriations or by some implied amendment to the Adjustment Act for each particular year, as the ASG contends, is immaterial from a constitutional standpoint. Congress' action in each year constituted an unconstitutional diminution in compensation.

Appellant contends with respect to the first three adjustments (fiscal years 1977, 1978 and 1979) that these were only an expectancy which did not vest, and that the right to a salary adjustment does not become "part of judges' compensation" until it becomes "payable" on October 1 of each year.[47]

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[47] The ASG has conceded for fiscal 1980 that, since the refusal to fund did not become law until October 12, 1979, and the adjusted salaries became payable on October 1, the right to the 1980 adjustment vested. The same is true with respect to fiscal 1977. For judges, the first day of the first pay period of the fiscal year begins at 12:01 a.m. on October 1. Since the limitation on the use of funds for fiscal 1977 was not signed until the day of October 1, 1976, the fiscal 1977 adjustment became payable before the limitation was approved. Indeed, in the district court, appellant conceded the validity of the argument that, "at least for several hours on October 1 [1976] judges were entitled to the higher salary". See, Motion to Affirm, 79-983 at 22-23, n. 23. Appellant now contends that fractions of days should be ignored.

The "rule" upon which the ASG relies is claimed to derive from *Lapeyre* v. *United States*, 84 U.S. (17 Wall.) 191 (1872), but is itself an exception to the general rule. As explained in *Louisville* v. *Savings Bank*, 104 U.S. 469 (1881), the *Lapeyre* test was developed for those circumstances "when the evidence does not show the necessity of regarding fractions of a day." 104 U.S. at 476. When there *is* a necessity to regard fractions of a day, the rule is to "ascertain the precise hour when a statute took effect by approval of the executive," 104 U.S. at 478.

The Acting Solicitor General acknowledges that the "limitation" contained in Pub. L. No. 96-86 was not adopted by Congress until "11 days after the cost-of-living increase for fiscal year 1980 had gone into effect for Judges." (Bf. at 11-13, 51, n. 43). This *reduction* is defended by the ASG solely on the theory that to establish a violation of Article III, section 1, judges must demonstrate that any challenged reduction was part of a discriminatory scheme designed to encroach upon the independence of the Judiciary.

To support his arguments, the ASG relies on a lower State court decision that has been overruled and held for naught by the Supreme Court of that State,[48] and on such obviously inapplicable cases as one dealing with employment rights of untenured teachers[49] and another concerned with parole rights of convicts.[50] The few other authorities cited by appellant are badly misconstrued or misapplied.

Appellees submit that the right to a cost-of-living salary adjustment is an integral part of judges' compensation. 28 U.S.C. § 135 specifically so provides. It is not an inchoate or unenforceable "expectancy". In addition, there is no requirement in the Constitution or in any decided case, that to establish a violation of Article III, section 1 involving a direct diminution in compensation, judges must prove some insidious plot to discriminate against them and compromise their independence. The task of assembling evidence to prove such motive demonstrates that the ASG's proposed rule of law is ludicrous. The arguments advanced by appellant are refuted by the entire history and experience

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[48] *Olson* v. *Cory*, 609 P.2d 991 (Cal. 1980) *rev'g* 93 Cal.App. 3d. 942 (1979), See pp. 52-53, *infra*.

[49] *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), discussed at p. 56, *infra*.

[50] *Greenholtz* v. *Nebraska Parole Inmates*, 442 U.S. 1, (1979), see p. 56, *infra*.

of the Compensation Clause, by every case interpreting the Clause, and by common sense.

A. The History And Purpose Of The Compensation Clause

The purpose of Article III, section 1 was to perfect the basic plan of Articles I, II and III of the Constitution, to make each branch of the government separate and independent of the others. The Framers of the Constitution were acutely aware of the need for an independent judiciary and were properly concerned about the inherently defenseless status of the Judicial Branch and its need for special protection. As Hamilton stated in The Federalist No. 78:

> The judiciary is beyond comparison the weakest of the three departments, . . . it can never attack with success either of the other two; and . . . all possible care is requisite to enable it to defend itself against their attacks.
>
> The Federalist No. 78 (A. Hamilton).

Thus, the Framers saw the need to keep judges independent as to their tenure and compensation. Hamilton further explained in The Federalist No. 79:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . In the general course of human nature, *the power over a man's subsistence amounts to a power over his will.*
>
> The Federalist No. 79 (A. Hamilton) (emphasis supplied).

The colonists were well aware of the evils resulting from an Executive or Legislature that might control the tenure or compensation of the judiciary. The colonial pamphleteers bitterly complained that "if the bench were occupied by 'men who depended upon the smiles of the crown for their daily bread' the possibility of having an independent ju-

diciary as an effective check upon the executive power would be wholly lost". *A Letter from a Freeman of South Carolina* . . . (Charleston 1774) quoted in Bailyn, *The Ideological Origins of the American Revolution* 107 (1967). In the Declaration of Independence, the colonists indicted the King for having "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."

Article III, section 1 responds directly to this concern. Madison wrote in The Federalist No. 51:

> It is equally evident that the members of each department should be *as little dependent as possible* on those of the others *for the emoluments annexed to* their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be nominal. The Federalist No. 51 (J. Madison) (emphasis supplied).

In the same vein Chancellor Kent noted:

> The provision for the permanent support of the judges is well calculated, in addition to the tenure of their office, to give them the requisite independence. It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station. The Constitution of the United States on the subject was an improvement upon all our previously existing constitutions.
>
> 1 Kent Comm. § 294 (11th ed. 1867).

Justice Story noted: "Without the provision [requiring undiminished compensation], the other, as to the tenure of office would have been utterly nugatory, and indeed a mere mockery." 2 Story § 1628 (ed. 1836) (explanation added).

This Court has consistently interpreted the Compensation Clause in keeping with these historical origins. The economic crisis of the 1930's gave rise to two important cases, *O'Donoghue* v. *United States,* 289 U.S. 516 (1933) and *Booth* v. *United States,* 291 U.S. 339 (1934), which demonstrate this point clearly. During the Great Depression, Congress found it necessary on a number of occasions to reduce the salaries of all government employees. Cognizant of the prohibitions of the Compensation Clause, however, Congress always excepted from any reduction the salaries of judges "whose compensation may not, under the Constitution, be diminished during their continuance in office." *O'Donoghue,* 289 U.S. at 529.

In *O'Donoghue,* the question before the Court was whether an Associate Justice of the Supreme Court of the District of Columbia was a judge appointed pursuant to Article III, section 1, and thus a judge protected under the Compensation Clause. In analyzing this issue, the *O'Donoghue* Court specifically referred to the writings of Mr. Justice Story and Alexander Hamilton (The Federalist, No. 78 and No. 79), as well as Chief Justice John Marshall's profound observation, in the course of the debates of the Virginia State Convention of 1829-1830, that:

> The Judicial Department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he [the judge] should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience; . . . I have always thought, from my earliest youth til now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent judiciary.
> 289 U.S. at 532.

The *O'Donoghue* Court concluded that District of Columbia judges came within the protections of Article III.

In *Booth* v. *United States,* 291 U.S. 339 (1934), the Court held that a retired federal judge was an Article III judge whose compensation could not be diminished despite the fact that salaries of federal employees generally were reduced, *i.e.* there was no discrimination. See fuller discussion of *Booth* at pp. 62-64 *infra.*

In both cases, it is important to note that the statutes in question exempted "judges whose compensation may not . . . be diminished during their continuance in office . . . ." *O'Donoghue,* 289 U.S. at 529.

A more recent instance in which Congress recognized that diminution of judicial compensation is prohibited under the Constitution, is the statute which forms the basis of appellees' claims in the instant case—the Adjustment Act. It provides that comparability adjustments which result in a *reduction* of an employee's pay are permissible *except* to the extent that such an adjustment would reduce the salary of "any individual whose compensation may not, under section 1 of Article III of the Constitution of the United States, be diminished during such individual's continuance in office." 79-983, J.S. 26a-27a

Nothing could more clearly demonstrate Congress' recognition that the Compensation Clause renders unconstitutional any direct diminution in judicial compensation, whether achieved through the lowering of salary levels or the refusal to appropriate sufficient funds to pay the full compensation mandated by law.

During the same period that *Booth* and *O'Donoghue* were decided, the Court also decided three cases involving the extent to which Congress might impose an income tax, applicable to the nation at large, upon the salaries of federal

judges, *Evans* v. *Gore,* 253 U.S. 245 (1920), *Miles* v. *Graham,* 268 U.S. 501 (1925), and *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939).

Evans is noteworthy primarily because the principles enunciated therein regarding the interpretation and application of the Compensation Clause continue to define its scope and meaning.[51] In applying those principles, the Court reviewed the historical authorities previously discussed and made clear that Article III, section 1 should be interpreted broadly in a way that achieves its objectives. In *Miles* v. *Graham,* the Court applied *Evans* to the case of a judge who took office *after* rather than before the income tax law was enacted, and as in *Evans,* held that he could not be taxed.

The next income tax case was *O'Malley* v. *Woodrough.* Judge Woodrough, like Judge Graham in the *Miles* case, had been appointed to his position after the effective date of the applicable tax law. The Court overruled the holding in *Miles* that "there is no power to tax a judge of a court of the United States on account of [his] . . . salary . . . ." While the Court refused the urging of the Solicitor General to also overrule *Evans,* the ASG suggests that *O'Malley* at least reflects the dissent of Justice Holmes in *Evans.* 253 U.S. at 265. (ASG Bf. at 63, n. 52). In light of that observation, it is useful to recall Mr. Justice Holmes' words in *Evans* that the Constitution's concern with undue dependence by the judiciary, "is a very good reason for preventing attempts to deal with a judge's *salary as such,*" but does not relieve judges from the "ordinary duties of a citizen". (emphasis supplied). The distinction between attempts to deal with a judge's salary "as such," and the general obligations of citizenship, was clearly drawn.

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[51] See *Atkins* v. *United States,* 556 F.2d 1028, 1043-45 (Ct. Cl., 1977), *cert. denied* 434 U.S. 1009 (1978).

Several principles emerge clearly from this constitutional history and judicial precedent. Article III, section 1 is a prophylactic measure: it removes from Congress any possible temptation to punish the judiciary, and any temptation of the judiciary to favor Congress or Congressmen in any way. It is also designed to ensure that quality candidates are attracted to and retained within the judiciary, by a promise of adequate and assured compensation. Whatever Congress has promised during any part of a judge's tenure, he can count on having throughout his career as a judge. To quibble about the motive that Congress may or may not have expressed or intended, or to argue that the entitlement is contingent until October 1 of each year, eviscerates the absolute protection intended and expressed in Article III, section 1. It also ignores the clear language of the Adjustment Act as well as that of 28 U.S.C. § 135 and similar statutory provisions.

B. The Right To Cost-of-Living Salary Adjustments Is A Component Of Judges' Compensation.

For years Congress specified judicial compensation in 28 U.S.C. § 135 (and similar statutory provisions) by a precise sum. But when the Adjustment Act was enacted in 1975, Congress amended this section to provide, "Each judge . . . shall receive a salary at an annual rate determined under section 225 of the Federal Salary Act of 1967 . . . as adjusted by section 461 of this title [the Adjustment Act]." Pub. L. No. 94-82, Section 205, 89 Stat. 422. Congress thus defined the compensation of a federal judge to include an annual percentage adjustment in salary equal to the percentage adjustment made in the salaries of General Schedule employees.

The ASG's argument that the right to the annual salary adjustment is not a protected element of judges' salaries until it becomes payable on October 1 of each year is in-

consistent with the clear language of 28 U.S.C. § 135 as well as the entire history of Article III, section 1. Providing a statutory formula for determining a judge's salary, and then declining to appropriate funds sufficient to pay that salary clearly violates the prohibition of the Compensation Clause.

This issue was resolved 177 years ago in the very first reported case to consider the Compensation Clause, *United States* v. *More,* 7 U.S. (3 Cranch) 159 (Ct. D.C. 1803) (Marshall C.J., concurring). At issue was an Act of Congress abolishing fees charged by justices of the peace in the District of Columbia. Judge More claimed that the law could not be invoked as to justices of the peace who were in office at the time such fees were set by an Act of Congress. The Court agreed, holding that the right to such statutorily mandated fees was a component of compensation which could not be withdrawn. The justices' fees were not payable until the services were rendered. Thus, the amount of fees any justice would receive in any year was unknown, or only an "expectancy". Nevertheless, the court held that as to sitting justices, the abolition of these fees was a diminution of compensation in violation of Article III, section 1.

As the court below correctly recognized, Article III, section 1 obliges Congress to declare what the compensation of a federal judge shall be. It may do so by defining the salary component of a judge's compensation in dollars, as it did prior to 1975, or in terms of a specific formula, as 28 U.S.C. § 135 and related statutory provisions now do. Formulas for determining compensation are common in employment contracts, statutes and other provisions covering most of the American work force, including federal, state and local government officers and employees. While a judge's salary adjustment may not be payable until after October 1 of a particular year—a point upon which appellant so heavily relies—the entitlement or right to that

adjustment has existed since the enactment in 1975 of the Executive Salary Cost-of-Living Adjustment Act. The continuing right to the salary adjustment is provided by 28 U.S.C. §§ 135, 5, 44(d), 213 and 252 and is part of the Compensation protected by Article III, section 1.

The Supreme Courts of Delaware and California recently addressed this question in interpreting their own constitutional prohibitions against the diminution of judicial salaries. Citing this Court's decision in *Booth* v. *United States, supra,* the Delaware Court observed that the constitutional provision must logically "apply as well to a threat of removing a salary adjustment as the salary itself. . . ." *Stiftel* v. *Malarkey,* 384 A.2d 9, 15 (Del. 1977). In that case, the Court considered the same arguments appellant advances here and said:

> It is argued that a formula supplement like the one in this case is a "future" promise which can be revoked with impunity, whereas a stated salary increase would be legally different. We fail to see the basis for such a distinction. 384 A.2d at 16.

The Court viewed the annual cost-of-living adjustments *as a part of the judges' compensation* which may not be revoked.[52]

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[52] The ASG states that *Stiftel* did not pass on the issue of whether judges were entitled to cost-of-living adjustments before the annual effective or "payable" date. (ASG Bf. at 56, n. 47). But the *Stiftel* court unequivocally held that the right to annual adjustments vested with the effective date of the Cost-of-Living Adjustment Law, not the effective date for annual payments. It stated:

> *The C.O.L.A. law, including its formula, was duly enacted in 1975; when it was enacted, it was applicable* to many public officers, including judges, and the efforts in 1976 to take these increments away were forbidden by Article XV, section 4, of Delaware's constitution. *Id.* at 16 (emphasis supplied).

In *Olson* v. *Cory, supra,* the Supreme Court of California held unconstitutional an attempt by the California Legislature to place a limit on cost-of-living increases previously provided for judicial salaries. In ruling that this legislation was in conflict with the constitutional provision prohibiting the diminution of judges' salaries, the court stated:

> Security of both tenure and subsistence are important factors in creating and maintaining an independent judiciary. These factors are met by insuring relatively long, fixed terms of office . . . and foreclosing reduction in salary during term of office. Should the state arbitrarily limit the cost-of-living salary, the level of subsistence would be reduced. 609 P. 2d at 998.[53]

Appellees submit that, since passage of the Adjustment Act in 1975, the right to a cost-of-living adjustment has been a component of a judge's compensation. Any argument to the contrary flies in the face of the clear language of 28 USC § 135 and similar statutory provisions. Moreover, the views of two Presidents, the Congress, and various agencies, to the effect that the temporary limitations did not affect the lawful salary levels as adjusted, support the conclusion that the right to such adjustments is now a part of the salary of each judge, as defined by statute. Clearly, if annual salary adjustments were mere expectancies, the restrictions contained in the appropriations acts would have eliminated, not just postponed, them. Yet, the ASG concedes that the appropriations limitations were temporary only and the salary adjustments were not permanently eliminated.

These concessions notwithstanding, appellant urges that a cost-of-living salary adjustment *formula* can never be

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[53] The ASG relies on the decision of the appellate court, *Olson* v. *Cory,* 156 Cal. Rptr. 127 (Ct. App. 1979), which was reversed by the Supreme Court. (ASG Bf. at 55 and 59).

part of the compensation of a federal judge protected by Article III, section 1, because it would "unduly limit the constitutional province of Congress." (ASG Bf. at 58). This is obviously wrong. First, it has been held from the earliest that Article III, section 1 and its State counterparts protect judges' compensation against diminution beyond the mere dollars in each paycheck. *United States* v. *More, supra, Olson* v. *Cory, supra,* and *Stiftel* v. *Malarkey, supra,* all support this proposition. While the Constitution guarantees no federal judge that the Congress will improve his financial standing, it absolutely prohibits the Congress from worsening it. This is the Constitutional limitation on the "province" of Congress.

> What might be extravagant today, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the Legislature to vary its provisions in conformity to the variations in circumstances; yet *under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.* A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation.

The Federalist No. 79 (A. Hamilton). (emphasis supplied).

Second, the security of having a cost-of-living adjustment is enjoyed as a present assurance. If the right to that adjustment can be withdrawn at the prerogative of Congress, judges are thereby *presently* "placed in a less eligible situation." Any power to deny judges the security of the cost-of-living salary adjustment established by statute as part of their defined salary would be the power to "change the condition of the individual for the worse." If Congress can constitutionally withhold that portion of a judge's compensation represented by the annual salary adjustment, there

is no constitutional obstacle to its withholding a portion of the fixed sum to which a judge is entitled under Section 225 of the Federal Salary Act of 1967. Statutory provisions such as 28 U.S.C. § 135 make no distinction between the two elements of judges' compensation. We submit that Congress may not constitutionally withhold part or all of either.[54]

The ASG maintains that "compensation" includes nothing beyond that which has been received in the past. A statutory entitlement to adjusted compensation is viewed as a mere "expectancy". Extended logically, this concept would allow Congress to approve a quadrennial adjustment under the Federal Salary Act raising base compensations (including federal judges'), and then, before the first payment date, for political or other reasons, pass an appropriations limitation or other prohibition against payment. Such a narrow interpretation is patently incorrect, for the prohibition against diminution of compensation must be coextensive with the potential for undue financial influence by Congress upon judges. The purpose of Article III, section 1 was to place federal judges *beyond the influence* of the Congress or the Executive in matters affecting their finances. This includes any part of the compensation to which they are entitled by statute, and is not limited to amounts previously paid. See discussion in Brief of *amicus curiae,* Chicago Bar Association at p. 19.

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[54] In footnote 45 (ASG Bf. at 52) appellant also refers to statements in Congressional debates that adjustments in salary are to be made in October of each year. That annual adjustments are payable commencing in October, however, does not mean that the right to an adjustment is not already in existence. On the contrary, if that were the case, *additional legislation* would be needed each October to affect the payment. Yet it is clear that no such additional legislation is required. On October 1 of each year, the salary adjustment becomes payable absent any further action by Congress.

The weakness of the ASG's position is also evident from the authorities he cites to support it. In arguing that federal judges have merely an expectancy of salary adjustments, he cites *Board of Regents* v. *Roth,* 408 U.S. 564 (1972), a case involving the claims of an untenured school teacher to be re-hired. The teacher had no contract, let alone a statutory or constitutional entitlement to compensation.[55]

United States v. *Larionoff,* 431 U.S. 864 (1977) (cited at ASG Bf. at 54), established that a member of the Armed Forces *had a vested right* to a re-enlistment bonus *even though the payment date had not yet been reached* when Congress voted to rescind the bonus. *Greenholtz* v. *Nebraska Penal Inmates,* 442 U.S. 1 (1979), deals with distinctions between parole revocation and parole granting. It has nothing whatsoever to do with the issues before this Court.

Absent any authority to support its position, appellant attempts to amend the Constitution by changing the tense

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[55] In footnote 46 (ASG Bf. at 53), appellant suggests that several contingencies could defeat the judges' expectation of an annual salary adjustment. These "contingencies" may be dealt with swiftly: 1) that General Schedule employees receive no adjustment—but since the judges' entitlement is only to the adjustment General Schedule employees receive, this would not deprive judges of any rights under the formula; 2) that Congress could repeal the Comparability Act—then there would be no salary increases for judges either, in keeping with, *not* contrary to, the statutory provisions involved; 3) that Congress could repeal the Adjustment Act which grants federal judges the same annual adjustment as General Schedule employees—surely appellant must realize that that would be precisely the same unconstitutional action challenged here; 4) that Congress could supersede the increases "for high-ranking federal officials"—once more, whether Congress can do that or not is precisely the issue in this case. Appellant concludes with an in-

of the Compensation Clause. The ASG argues that cost-of-living increases are not part of judicial compensation until they become "payment 'receive[d] for their services' (Article III, section 1)" (ASG Bf. at 53). The ASG's insertion of "[d]" to change the constitutional provision to the past tense is no more subtle than it is convincing.[56] It is the right to the annual salary adjustment that since 1975 has been an integral part of judicial compensation.

The ASG next argues, without citation, that this case would be the same if Congress had "expressly reserved . . . the power to supersede an annual salary increase prior to its effective date." (ASG Bf. at 54). In fact, the Congress reserved itself no such power; and the discussion of what Congress *might* have done only points up the inadequacy of appellant's statutory analysis. Congress granted a cost-of-living adjustment to federal judges as part of their compensation with no conditions attached.

Since Congress reserved no power in 1975 to alter or withhold adjustments for judges, the ASG argues that "[s]uch authority to amend or repeal legislation is necessarily retained by Congress in all cases". The general rule of statutory construction, that Congress can undo what Congress has done, has always been subject to the strictures of the Constitution. Otherwise, Congress could now

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apposite reference to *Benedict* v. *United States*, 176 U.S. 357 (1900), which held, on statutory interpretation grounds, that a retired federal judge was not entitled to bonus pay for taking assignments to the criminal circuit in New York, since he no longer took such assignments. The bonuses were paid on an assignment basis; no permanent adjustment in salary was at issue.

[56] The ASG concedes that the fiscal 1980 adjustments vested on October 1, 1979, at the latest. (ASG Bf. at 51, n. 43). Yet no judge actually *received* a higher paycheck.

lower federal judges' salaries to their 1960 (or 1860) levels under the rationale that the salary increases from 1960 (or 1860) to the present had also been granted by Congress.[57] This argument is not only contrary to all decisions and commentaries on, and the history of, Article III, section 1, but is at odds with appellant's own statement, in discussing *United States* v. *More, supra,* conceding "that the Compensation Clause extends to elements of judges' compensation that have gone into effect but have not yet been paid." (ASG Bf. at 56, n. 47). Of course, *More* compels this result. What Congress unsuccessfully attempted in *More* was precisely what Congress has attempted here—to abolish a compensation method under which an undetermined amount of money was to be received at some time in the future.

The ASG also seeks support from the Congressional Research Service's Report, *Diminution of Judicial Salaries,* discussed at p. 35 *supra.* (ASG Bf. at 55, n. 47). He fails to note that this study, which analyzed only the fiscal 1980 limitation (Pub. L. No. 96-86), concluded in unequivocal terms that the fiscal 1980 limitation could not constitution-

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[57] *Glidden Co.* v. *Zdanok,* 370 U.S. 530 (1962), offered by appellant for the general proposition that Congress can adjust terms of tenure or salary of "federal officers," makes the explicit reservation, "apart from this provision," referring to Article III, section 1. 370 U.S. at 534. *United States* v. *Dickerson,* 310 U.S. 554 (1940), also cited by the ASG, strongly supports appellees' position on the non-Constitutional argument (that Congress does not repeal an entitlement solely by failing to appropriate). *Dickerson* simply does not involve Article III, section 1. *Butler* v. *Pennsylvania,* 51 U.S. (10 How.) 402 (1850), exclusively concerns employment of state officers and also does not involve Article III, section 1. In *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810), appellant's final citation, the Court actually held that the Georgia legislature was *prohibited* from undoing its own grant of real property. The Court held that the federal Constitution imposed limitations on the general power of a legislature to take back what it has given. 10 U.S. (6 Cranch) at 139.

ally be applied to Article III judges. The Report states forcefully that "[w]e have in the course of the paper considered several possible arguments with respect to interpretations that would allow an escape from the diminution of compensation clause but have found no textual or precedential support for them." CRS at 25-26. This conclusion is equally applicable to the other years here involved.

The CRS also included the Adjustment Act as one of the "pay acts" which comprise the "machinery" for determining "what sum shall be received by each judge", quoting from *Miles* v. *Graham, supra.* CRS at 20. As previously noted, (p. 35 *supra*) the Service concluded that "there seems to be . . . no precedent for a contention that the entitlement to compensation of judges which cannot be reduced arises only with the enactment of an appropriations bill". CRS at 23.

The ASG also refers to the proceedings of the Constitutional Convention. In doing so, he relates the efforts of Madison to impose a restriction on compensation increases, but omits any mention of Madison's corollary cost-of-living proposal based upon the price of a commodity of standard value, such as wheat.[58] Madison was against granting Con-

[58] See generally, 2 M. Farrand, Records of the Federal Convention of 1787 at 44-45 (ed. 1966) (Proceedings of July 18, 1787). The framers understood that the term "compensation" could include a cost-of-living adjustment. Madison was opposed to allowing increases or decreases and was confident that a cost-of-living adjustment plan would moot the need for other salary increases for federal judges. Others disagreed, but only because they felt such a cost-of-living adjustment formula might not provide adequate enough compensation. But every participant in the debate would have been surprised by the suggestion that a cost-of-living adjustment formula could not be part of a judge's protected compensation. If such a formula, once enacted, were not part of the compensation against which diminution was forbidden, Madison would have been suggesting a very inadequate justification indeed for eliminating all other means of raising federal judges' salaries.

gress the power to affect judges' pay in any way, but compromised on the ground that the more worrisome dependence was that resulting from allowing Congress to *diminish* federal judges' compensation. The ASG apparently contends that, because Congress may refuse to enact salary increases for Article III judges, it may rescind a salary adjustment mandated by statute which has not yet been paid (ASG Bf. at 58). There is an obvious difference between a failure to increase and the withdrawal and diminution of present rights. The Constitutional compromise was to forbid any such diminutions, while allowing increases.

Appellant's final contention is that the result sought by appellees would deny Congress any future flexibility in determining the pay of federal judges. Appellees disagree. Should the President and Congress concur that, because of concerns for budget deficits or inflation, annual cost-of-living salary adjustments should be withheld, they may do so by refusing to adjust General Schedule salaries under the Comparability Act. In that event no increase would be due federal judges under the Adjustment Act. Nor is there any prohibition against Congress taking itself and the top-level executives out of the compensation formula afforded to General Schedule employees and judges. All that Congress is forbidden from doing is adjusting General Schedule salaries pursuant to the Comparability Act without offering the same adjustment to the less than 1000 federal judges. Given the number of federal employees subject to the Comparability Act—approximately 1.6 million—it is absurd to argue that including adjustments for less than 1000 Article III judges deprives the Congress of "flexibility" or would have any appreciable impact on its ability to combat inflation or balance the budget.

As demonstrated, no case supports appellant's view that Congress may constitutionally refuse to pay part or all of

a judge's compensation, whether specified in dollars or determined under a compensation formula. *More, Stiftel,* and *Olson* all directly reject this contention. Appellant's basic logic is that compensation includes nothing more than dollars-in-hand received. The rationale behind Article III, section 1 rejects this, as do practicality and common sense. And the Constitutional framers themselves, as shown by their discussions, would have rejected it as well. Conversely, they undoubtedly would have endorsed with enthusiasm the present compensation formula, which includes annual salary adjustments, *provided* that such adjustments were absolutely secure from interference by the other branches of the government.

C. To Prove a Violation of the Compensation Clause, Appellees Do Not Have to Establish That the Diminution In Compensation Discriminates Against Judges.

Appellant argues that, even assuming that the compensation of judges has been diminished, the judgment below must still be reversed on the ground that a diminution in compensation of federal judges is not unconstitutional unless it is part of a discriminatory scheme designed to encroach upon the independence of the judiciary.

In other words, the ASG would have this Court amend Article III, section 1 by judicial decision to read:

> Judges, . . . shall . . . receive for their services, a compensation, which shall not be diminished during their continuance in office, *except when no discrimination which undermines their independence is intended or effected.*

The opinion of the district court soundly rejected such an interpretation of the Compensation Clause, described by the *amicus curiae,* American Bar Association, as "an attempt to engraft a novel concept without support in history or

authority which would completely undermine the Compensation Clause . . . ." (ABA Bf. at 8-9). It has never been held by any court that proof of a discriminatory animus is necessary to render a direct diminution of a federal judge's compensation unconstitutional.[59] The rule has always been, and no case stands to the contrary, that congressional action which reduces or withholds from a judge that to which he is entitled as compensation is, without more, unconstitutional. *Booth* v. *United States,* 291 U.S. 339 (1934).

The setting of *Booth* was a time of national economic peril. During the Great Depression, the federal government considered it necessary to reduce the wages of its employees a number of times. These reductions were not applied to Article III judges. Congress itself recognized that such a reduction would violate Article III, section 1. For example, Pub. L. No. 72-212, 47 Stat. 382, 402, section 197(5) (1933) provided:

> [t]he salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum.

This section accompanied other provisions cutting the salaries of other federal employees, including Members of Congress, employees of the District of Columbia, mail carriers, etc. *See, e.g.,* Pub. L. No. 72-212, 47 Stat. 382, 401, section 105 (1933).

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[59] Only where the compensation of federal judges has been affected by the indirect impact of a general burden of citizenship, has this Court or any court suggested such a prerequisite to a claim of unconstitutionality. See *O'Malley* v. *Woodrough,* 307 U.S. 277 (1939) (general income tax); *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009 (1978) (inflation).

The next year, more expenditure reductions were deemed economically necessary. In the Act to Maintain the Credit of the United States Government of 1933, Pub. L. No. 73-2, 48 Stat. 8, pensions were reduced, and three months later, in an Act entitled Fourth Deficiency Act, Fiscal Year 1933, Pub. L. No. 73-78, 48 Stat. 283, the salaries of additional federal employees were reduced. Section 13 of the latter act, 48 Stat. 283, 307, cut the retirement pay of federal judges by 15%. In the same statute, a host of other federal employees' salaries were reduced in similar amounts. *There was no discrimination.*

Judge Booth, a retired federal judge whose salary had been reduced by 15%, brought suit against the United States. The Solicitor General argued that *retired* judges were not entitled to the protection of the Compensation Clause. The Court disagreed and ruled that retired judges were entitled to the guarantees of Article III, section 1, and held, therefore, that the attempted diminution was unconstitutional.

If the prohibition against diminution were meant to contain the additional proviso urged by the appellant, proscribing diminution of a judge's compensation only when accomplished for the purpose of discrimination, the Court in *Booth* could not have ruled the challenged statute unconstitutional. The reduction in compensation at issue in that case was in the context of a *general cut in salaries for all federal employees, in the face of severe economic conditions.* The Court would, at least, have been forced to *inquire* into whether the 15% reduction in pay for retired judges was a discrimination calculated to interfere with their independence. Such a question was never even posed.

Unable to avoid the force of the *Booth* decision, appellant simply responds that *Booth* was decided prior to the Court's decision in *O'Malley* v. *Woodrough, supra. O'Mal-*

ley, which dealt with the application of the federal income tax to a judge's salary, held that liability for payment of the income tax was a common duty of citizenship to which a federal judge was also subject. That case made no attempt to overrule or distinguish *Booth,* for no such action was necessary. The cases are not inconsistent with each other or with the district court's decisions in these cases.

A comparison of *Booth* and *O'Malley* illustrates the distinction between direct and indirect diminution. A *direct* diminution is one that deals with judges' salaries "as such"; an indirect diminution is one that merely impacts upon compensation as an unavoidable consequence of a commonly shared duty of citizenship. Justice Holmes, in his dissent in *Evans* v. *Gore* (upon which the ASG so heavily relies), made the distinction perfectly clear. The constitutional reason for prohibiting Congress from reducing judicial pay, based on the need to preserve an independent judiciary, "is a very good reason for preventing attempts to deal with a judge's salary *as such,*" (emphasis supplied) but was in Mr. Justice Holmes' view, an inappropriate factor in determining whether a judge ought to be subject to the "ordinary duties of a citizen." 253 U.S. at 265.

Justice Holmes was making precisely the distinction between a case like *Booth* (an attempt to deal with a judge's salary "as such") and a case like *O'Malley* (a common duty of citizenship, affecting judicial salaries only indirectly). *Booth* and *O'Malley* thus combine to form a single rule—that Congress *may not* enact a law withholding some part of a federal judge's compensation; but it *may* enact a law that applies to virtually all citizens and has the indirect effect of lowering the take home pay of all those to whom it applies (including judges).

That explanation is precisely the one given by the United States Court of Claims in a case much relied upon by the

ASG, *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied* 434 U.S. 1009, 1045 (1978):

> What *O'Malley* did add to the body of learning on the Clause was that nondiscriminatory actions of Congress, those affecting the public generally, though indirectly bringing about the lowering of judges' "take-home pay," would nevertheless pass muster under the Clause.

The dissenters in *Evans*, who initiated the distinction between direct and indirect diminution, were Justices Holmes and Brandeis. Justice Brandeis was still on the Court at the time of *Booth*, and he joined in the Court's unanimous Opinion. It is disingenuous, therefore, for the ASG to feign confusion on the direct-indirect distinction. And it is worse still to cite the opinion of the Court of Claims in *Atkins* as rejecting the direct-indirect diminution distinction, for that opinion expressly upheld it.

The constitutional basis for the differing tests between direct and indirect diminution was ably expressed as early as 1843 by the Supreme Court of Pennsylvania, interpreting its own analogous provision by reference to the United States Constitution. In *Commonwealth ex rel. Hepburn* v. *Mann*, 5 Watts & Serg. 403 (1843), the Pennsylvania legislature had imposed a tax on the salaries of officers serving under the Constitution and statutes of Pennsylvania and certain other persons. It was not a tax upon the general public.

The court in *Hepburn* first noted that no "insidious" motive of the legislature was involved, *i.e.* there was no purpose to attack judicial independence or discriminate against judges through this tax. The court further observed, in language similar to that found in Justice Holmes' dissent in *Evans*, that the income of a judge "is a proper subject of taxation" so long as the tax is imposed upon all citizens alike. For then the judges' "security will . . . consist

in being placed on the same footing with other citizens, and the abuse of them . . . will be speedily corrected." *Id.* at 417. The court then held that a *selected* tax imposed upon a large class (but less than the entire public) may not be imposed upon the judiciary.

In place of Justice Holmes' rule forbidding all diminutions in a federal judge's salary "as such," a rule that has been upheld in every decided case, the ASG would proffer a rule requiring a court to ascertain whether or not Congress intended, or effected (the ASG does not tell us which) a discrimination against federal judges. The Congressional Research Service Report, *Diminution of Judicial Salaries,* rejected this interpretation when it concluded that "the diminution of compensation clause contains an express prohibition, compensation shall not be reduced while a judge continues in office, which is determinable *without reference to motivation.* . . ." CRS at 12. (emphasis supplied).

The need to make a specific finding of motive in the face of a direct diminution would eviscerate the prophylactic purpose behind Article III, section 1. That section was added to remove from the Congress, "as far as may be possible", the power to affect a federal judge's compensation for the worse. Consequently, *all* direct diminutions were forbidden. As the *amicus curaie,* ABA, points out, proof of legislative motive adverse to the judiciary would be impossible in the ordinary case, and the imposition of such a requirement would "frustrate the purposes of the Compensation Clause". (ABA Bf. at 14-15).

In this connection, mention should be made of one additional, highly relevant source for Constitutional interpretation: the Congress itself. Several times within this century Congress has passed laws which did or could diminish the compensation of federal employees, but which explicitly exempted federal judges for constitutional reasons. On each

occasion, federal judges could have been included without any claim of discrimination against them. A number of such laws were adopted during the Depression. See discussion of *O'Donoghue* v. *United States* and *Booth* v. *United States, supra.* Another is the very law in question in this case:

> [The Adjustment Act] shall not apply to the extent it would reduce the salary of any individual whose compensation may not, under section 1 of Article III . . . be diminished during such individual's continuance in office. 28 U.S.C. § 461(b).

These repeated exemptions are not an expression of Congress' generosity toward federal judges. Each reflects, unmistakably, the belief of the Congress that federal judges' salaries may not be reduced, even as part of a salary reduction for all federal employees. These instances all stand as the clearest evidence that even Congress patently disagrees with appellant's argument.

CONCLUSION

Appellees have established on grounds of statutory construction that judges remain entitled to the annual cost-of-living salary adjustments mandated by statute. Addressing the Constitution, Article III, section 1's proscription is broad and unequivocal: "Compensation . . . shall not be diminished." Nowhere does the Clause state that "compensation" is limited to cash-in-hand previously received; nor does it even hint that Congress may reduce or withhold compensation simply because judges are not the objects of discrimination.

The Clause was fashioned to achieve a nobel and essential purpose—a highly qualified, independent Judicial Branch secure from undue influence by either of the other Branches of Government—and has been lauded and pro-

tected by the Framers, constitutional historians and the courts for almost 200 years. The proposals advanced by the ASG, unsupported by precedent or historical experience, would totally undermine this purpose and would nullify Article III, section 1 as a means of ensuring judicial quality, equality and independence.

For the reasons stated herein, appellees respectfully submit that the judgments of the district court should be affirmed in both appeals.

Respectfully submitted,

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August 12, 1980

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

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September 10, 1979

TO JUDGES OF THE UNITED STATES

SUBJECT: Judicial Compensation

I dispatched a memorandum on April 17, 1979, which outlined the compensation and benefits for circuit and district judges. In its outline of the salary component of judicial compensation at page 2, the memorandum averted to pending litigation which had the potential to have an impact on judicial salary rates and on the Director's ability to pay judcial salaries at their full salary rates, including the annual cost-of-living adjustments, from appropriations available to the Judicial Branch.

Since not all district judges nor circuit judges also potentially affected have been sent a copy, I attach for your information a copy of an order of the United States District Court for the Northern District of Illinois in this referenced action. *Will, et al.* v. *United States,* Civil No. 78 C 420 (N.D. Ill., order entered Aug. 29, 1979).* The court order grants the plaintiffs' motion for summary judgment on the basis of the finding that the actions of the defendant

* The names of the plaintiffs and their counsel are reflected in the attached order.

had resulted in a diminution of judicial compensation in violation of Article III of the United States Constituton. Count I involves the failure of the defendant to pay the cost-of-living adjustment under 28 U.S.C. § 461 (1976) for the period from October 1, 1976, through February 28, 1977. (New salary rates became effective on March 1, 1977, in accordance with 2 U.S.C. §§ 358,, 359 (1976). *See* 13 Weekly Comp. of Pres. Doc. 50 (Jan. 20, 1977), 42 Fed. Reg. 10297 (1977).) Count II involves the attempt of the defendant to deprive the plaintiffs of a cost-of-living adjustment under 28 U.S.C. § 461 (1976) effective October 1, 1977, through enactment of the Act of July 11, 1977, Pub. L. No. 95-66, 91 Stat. 270.

Since the court previously determined that the plaintiffs could maintain the action as a class action in accordance with Rule 23(b)(2) of the Federal Rules of Civil Procedure, I attach a copy of the order which defines the separate class for each of the two counts in the complaint. *Will* (order entered March 20, 1979).

The President has proposed an "alternative plan" for a pay adjustment to statutory pay systems (*e.g.*, the "General Schedule") under 5 U.S.C. § 5305(c)(1) (1976), to become effective on the first day of the first applicable pay period commencing on or after October 1, 1979, in the overall amount of 7%. 15 Weekly Comp. of Pres. Doc. 1530 (Sept. 3, 1979). If Congress should not disapprove this plan, the adjustment to the statutory pay systems would result in an automatic pay adjustment to the salary rates of judges in the amount of 7%. 28 U.S.C. § 461 (1976).

If the holding in *Will* for a 1977 cost-of-living adjustment were to become effective and assuming Congress will *not* disapprove the President's "alternative plan," the compu-

tations to determine the salary rates for judges effective October 1, 1979, would be as follows:

Event	District Judge	Circuit Judge
Base Salary Rate ..... Effective March 1, 1977 (42 Fed. Reg. 10297 (1977))	$54,500	$57,500
Salary Rate ..... Effective October 1, 1977 (includes a 7.05% cost-of-living adjustment, 13 Weekly Comp. of Pres. Doc. 1436 (Oct. 3, 1977))	58,300	61,600
Salary Rate ..... Effective October 1, 1978 (includes a 5.5% cost-of-living adjustment, 14 Weekly Comp. of Pres. Doc. 1480 (Sept. 4, 1978))	61,500	65,000
Salary Rate ..... Effective October 1, 1979 (includes a 7% cost-of-living adjustment, 15 Weekly Comp. of Pres. Doc. 1530 (Sept 3, 1979))	65,800	69,600

I must offer the caveat, however, that the rates at which the Director would be able to pay salaries (the "payable rates") would depend on any legislation to be enacted which limits the availability of appropriations under the control of the Director to pay salaries.

CARL H. IMLAY

Carl H. Imlay
General Counsel

Attachments